

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

BECHTEL CONSTRUCTION COMPANY

and

THOMAS FRITH Jr., an Individual

CASES 30-CA-17740

30-CA-17745

30-CA-17782

and

THOMAS FRITH, Sr., an Individual

Anita C. O’Neil, Esq., for the General Counsel.

Patrick V. Melfi, Esq. and Thomas G. Grooms, Esq.,
for the Respondent.

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on October 31, November 1, and November 2, 2007. The charge in Case 30-CA-17740 was filed by Thomas Frith, Jr., (Frith Junior) on May 2, 2007,¹ and amended on June 21, 2007. The charge in Case 30-CA-17745 was filed by Thomas Frith, Sr. (Frith Senior) on May 9, 2007, and amended on June 20, 2007. The charge in Case 30-CA-17782 was filed by Frith Senior on June 26, 2007, and amended on July 17, 2007.

On June 29, 2007, the Regional Director for Region 30 of the National Labor Relations Board (Board) issued an Order Consolidating Cases and Consolidated Complaint based upon the allegations contained in Cases 30-CA-17740 and 30-CA-17745. The consolidated complaint alleges that on various dates in February, March, and April 2007, Bechtel Construction Company (Respondent) threatened employees with unspecified reprisals, more onerous working conditions, and termination because they engaged in union activities. The consolidated complaint further alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act) by refusing to answer a request for overtime and harassing an employee by subjecting the work of that employee to closer scrutiny. The consolidated complaint also alleges that Respondent violated Section 8(a)(3) of the Act by refusing to allow Frith Senior to work overtime on March 19, 2007, and on April 5, 2007, and by assigning Frith Senior more onerous work duties and undesirable equipment on April 4,

¹ All dates are in 2007 unless otherwise indicated.

2007, and April 30, 2007. The consolidated complaint also alleges that Respondent terminated Frith Junior on May 1, 2007, in violation of Section 8(a)(3) of the Act.

5 On August 15, 2007, the Regional Director for Region 30 of the Board issued a complaint based upon the allegations in Case 30-CA-17782. The complaint alleges that Respondent violated Section 8(a)(3) of the Act by indefinitely suspending Frith Senior on June 26, 2007 and on June 29, 2007, and by terminating Frith Senior on July 2, 2007.

10 During the course of the hearing, the parties effected a settlement agreement pertaining to the discharge of Frith Junior. Based upon the settlement agreement, the undersigned approved the withdrawal of the charge in Case 30-CA-17740 as related to the discharge of Frith Junior. Accordingly, the consolidated complaint in Cases 30-CA-17740 and 30-CA-17745 was amended to delete² the paragraphs related to the discharge of Frith Junior. Thus, because of the settlement agreement and the amendments to the consolidated
15 complaint, the only issues remaining were the discharge of Frith Senior as alleged in the complaint of August 15, 2007 and the 8(a)(1) allegations contained in the consolidated complaint of June 29, 2007.

20 On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

25 Respondent, a corporation with an office and place of business in Oak Creek, Wisconsin, at the Elm Road Generating Station, has been engaged in the construction industry. During the past calendar year, Respondent purchased and received goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Wisconsin. Respondent admits, and I find, that it is an employer engaged in commerce within
30 the meaning of Section 2(2), (6), and (7) of the Act. Respondent further admits, and I find, that Teamsters “General” Local No. 200, affiliated with the International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

1. The work site

40 Respondent began its business operation in 1898 and is a nationwide engineering and construction company that is engaged in mega projects throughout the United States. Currently Respondent is building two 615 megawatt coal-fired power plants in Oak Creek,

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² The consolidated complaint was amended to delete paragraph 14 and to delete any reference to paragraph 14 in paragraph 19.

Wisconsin. The cost of the project is estimated at \$2.1 billion and the project is estimated to continue until the middle of 2010. There are approximately 2,000 employees working on the site and there are 15 to 16 trade/craft unions representing various employees working at the site. There are no non-union employees working at the Elm Road site. Teamsters "General" Local No. 200, affiliated with the International Brotherhood of Teamsters (Union) represents the employees who provide designated transportation for craft employees as well as building materials. There are two contractual documents that regulate the relationship between the Union and Respondent; (1) the Project Labor Agreement (PLA)³ and (2) the Area Construction Agreement (Area Agreement) including an Addendum. While the Addendum provides that the provisions of the PLA supersede certain specified articles of the Area Agreement, the parties look to the Area Agreement for guidance if the matter is not covered by the PLA. There are also site work rules; most recently revised on April 30, 2007. Labor Relations Manager Gregory Glynn testified that Respondent has had a working relationship with the building trades and international unions since the 1940's. He describes Respondent as a "union friendly" company; explaining that Respondent would not be able to build its various projects without the cooperation of organized labor.

In the latter part of winter and early spring of 2007, there were approximately 30 to 36 employees on the job represented by Teamsters "General" Local No. 200, affiliated with the International Brotherhood of Teamsters and herein referenced as the Union. These employees transported the project employees from the parking area to the specific job sites. These employees drove the dump trucks that moved dirt and materials to the job site as well as the flatbed tractor trailers or semi's and the five and one-ton trucks. Additionally, the Teamster employees drove the water truck used to water the roads and reduce the dust. During this time there were approximately ten buses and seven to eight semi tractors. All of the vehicles were parked in a parking lot outside the connex; the building where the employees reported to work each day. Frith Senior described the connex as similar to a double-wide trailer measuring about 60 feet in length. In addition to being the place where the Teamster employees usually took their breaks, the connex contained a work area for the foremen, general foreman, and the dispatcher. Respondent's Labor Relations office is housed in a building that is described and known as the "14-wide."

Using a two-way radio, the dispatcher maintains contact with the foremen and general foreman. Because there are CB radios in the vehicles, he is also able to maintain communication with the drivers. The dispatcher informs the drivers of their job assignments and notifies them when they need to return to the connex. He also keeps the drivers posted on emergency situations such as road closings. The drivers also communicate with the dispatcher to relay information to the foremen and general foreman.

During the pertinent period, semi drivers were assigned on a rotating basis to the different work areas within the work site. The area identified as the "North Yard" or the Ironworkers yard is a large "lay-down" yard area where all of the outside iron is brought into the work site. The Ironworkers position the iron on the ground and the iron is then transported by the Teamsters when it is needed at the actual building site. The area known as

³ The PLA is an agreement between the Wisconsin Energy Corporation (the primary employer) and the Milwaukee Building and Construction Trades Council, AFL-CIO.

Spang Farm is located approximately two miles from the connex and is another “lay-down” yard used by the Boilermakers and Pipefitters. The area known as the Bowl is the actual building site and is the area where almost all of the materials are ultimately transported.

5 At the time of Frith Senior’s discharge in July 2007, there were three foremen, a general foreman and a dispatcher in addition to the regular Teamster drivers. Curt Kurtz was the foreman for the buses and Steve Dobrowolski was the foreman for the dump trucks. Rick Budnik was the foreman for the semis and Vince Klingbeil was the general foreman. Stan Nizynski, who worked as the dispatcher, maintained a desk adjacent to Klingbeil’s in the
10 connex. A number of witnesses⁴ testified without contradiction that Klingbeil and Nizynski were close friends. During the relevant time period, John Swan was Respondent’s Assistant Superintendent for the Distribution Group and Bob Carr was Respondent’s Superintendent.

15 At the beginning of 2007, Michael Gurich was elected Business Agent for the Union, replacing Frank Ardellini.

2. Frith Senior’s employment history

20 Frith Senior has been a member of the Union for 27 years. When he began working with Respondent in mid-January 2006, he worked as a regular crew employee. After approximately a week on the job, he was promoted to foreman. After three or four weeks as a foreman, he was promoted to general foreman. Frith Senior testified that he was removed as general foreman at the end of July, 2006. He was told that he was removed as general foreman because he hired untrained personnel. After July 2006, Frith Senior worked as a
25 regular driver on first shift until his discharge in July 2007. On June 1, 2007, Frith Senior became an alternate union steward.

B. The Position of the Parties

30 Counsel for the General Counsel maintains that while the Respondent characterizes itself as “perhaps the most union-friendly construction company in the history of this country,” Respondent’s general foreman has acted unlawfully in response to protected conduct that he views as defying and challenging his authority. General Counsel asserts that General Foreman Klingbeil and Foreman Rick Budnik engaged in numerous incidents of
35 threatening and coercive behavior because of Frith Senior’s union and protected activities. Further, the General Counsel submits that Frith Senior was ultimately terminated after he successfully assisted a co-worker as a union steward.

40 In addition to challenging the alleged supervisory status of Budnik, Respondent contends that any coercive statements attributed to Klingbeil are not violations because they do not concern protected activity. The Respondent further asserts that Frith Senior was lawfully terminated because he had two violations of the work rules within a 12 month period. Respondent asserts that Frith Senior violated the rules by working in an unsafe manner on June 26, 2007 (Item number one of Category III of the work rules) and by violating

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 ⁴ Frith Senior, Terry Foss, Frith Junior, and Scott Olson described Klingbeil and Nizynski as friends or buddies.

Respondent's Equal Employment Opportunity or Anti-Harassment Policy on August 11, 2006
(Item number five of Category II of the work rules.)

C. The Supervisory Status of Rick Budnik

5 General Counsel alleges that Rick Budnik (Budnik) is a supervisor and an agent of
Respondent within the meaning of Section 2(13) of the Act. In the consolidated complaint of
June 29, 2007, General Counsel alleges that Budnik engaged in four specific acts of unlawful
conduct in which he threatened or harassed employees in violation of Section 8(a)(1) of the
10 Act. The total evidence presented by General Counsel also includes allegations that Budnik
worked in conjunction with General Foreman Vince Klingbeil (Klingbeil) to further coerce
Frith Senior in violation of Section 8(a)(3) and (1) of the Act. There is no dispute that
Klingbeil is a supervisor. Respondent not only denies that Budnik engaged in the conduct
alleged, Respondent also denies that Budnik is a supervisor or its agent. Thus, the supervisory
15 and agency status of Budnik is a significant issue in this case.

1. Background

20 Budnik began working for Respondent in March 2006. During the month after he was
employed, Budnik became a union steward and held that position until August 14, 2006. In
late February or early March 2007, Budnik became a foreman on the job site.

2. Duties, responsibilities, and benefits of the foremen

25 All of Respondent's Teamster foremen are paid a dollar more an hour than the
employees in the highest pay rate of the classification they supervise. The foremen are all
paid the same amount and have the same duties and authority. The general foremen earn a
dollar more an hour than the foremen. Under the terms of the Addendum to the Area
Agreement, Respondent has the exclusive right to select its foremen and general foremen and
30 to remove individuals from the foreman and general foreman position. Those rank-and-file
employees below the classification of foreman or general foreman are referred for work to
Respondent by the Union through a requisition process.

35 All employees working on the job site are issued a hard hat. Varying colors of
horizontal strips on the hard hats indicate the employees' individual craft. Foremen have an
additional vertical strip on their hats and general foremen have two additional vertical stripes
on their hats. General foremen report to the various superintendents on the job.

40 All the foremen, general foremen, and superintendents from the different crafts attend
a weekly supervisory safety meeting. The foremen and general foremen are given updates on
the job progress and various environmental and safety issues are discussed. Materials are
distributed concerning job accidents and recommended measures to prevent the accidents.
When the foremen and general foremen conduct their daily safety meetings with the
individual craft employees, they share the pertinent job site and safety information with the
45 rank-and-file employees. During the time of the alleged violations, foremen and general
foremen drove a Dodge Intrepid; a company car for their use in getting around the job site.
Rank-and-file employees normally did not use the vehicle as a part of their usual job duties.

A foreman can prepare a disciplinary warning for an employee. The general foreman has the authority to either sign the written warning or change it to a verbal warning. If the general foreman signs the document, the written warning is then submitted to the superintendent, who also has the authority to sign it or convert it to a verbal warning. During the time that Frith Senior served as a general foreman, Klingbeil was a foreman. Frith Senior recalled an incident in which Klingbeil recommended that an employee receive a warning because she damaged a bus. Frith Senior explained that while he had believed that a verbal warning would suffice, Klingbeil had insisted upon the written warning. Frith Senior accepted Klingbeil's recommendation and the employee received a written warning.

At the end of the day, employees are required to submit to the foremen the cost codes for the work that they performed that day. Using their own passwords for the computer in the timekeeper's trailer, the foremen prepare the daily time sheets. Klingbeil explained that cost codes are needed in order for the different crafts to be charged for the time they utilize Teamster employees on the work site. Klingbeil also explained that while the foreman inputs employee hours allocated for the various cost codes, the hours must correlate to the total number of hours worked by the employee as shown by the employee's time card.

When Terry Foss worked for Respondent as the foreman on second shift, there was no general foreman present during the shift. Foss confirmed that he had to do "a lot of the things" that Klingbeil normally did during the day shift. As the second shift foreman, he was responsible for attending turnover meetings, assigning work, and overseeing different Teamster jobs at the site. Foss explained that turnover meetings are the meetings held at the shift turnover and attended by the superintendents, general foremen, and foremen who are in charge of their crews. There are safety issue discussions as well as discussions about the anticipated work for the next shift. The meetings are not attended by the rank-and-file employees. He recalled that in assigning work, he relied upon employees' skills as well as their ability to get along with other employees. If he thought employees were burned out or close to burning out on their jobs, he rotated them to different duties. He made the reassignments without consulting with either Klingbeil or any of the superintendents. If there was a need for discipline during his shift, he completed the necessary form and submitted it through the chain of command. He recalled a particular employee who received a written warning who was not performing her work. After several discussions with her, Foss determined that she needed written discipline. He prepared the warning and submitted it to the superintendent. The superintendent told Foss that he trusted Foss to do what was right and accepted his recommendation. He told Foss that if he wanted to give the employee a warning, Respondent would issue a warning to her. Foss also testified that if there was an incident that occurred on second shift that he believed to be serious, he would consult with the superintendent before taking action. If it was something that he could resolve, he did so without consultation.

When employees want to take time off from work, they complete a request time sheet and submit it to the foreman. Foss testified that if the employee's absence would not affect the work, he would sign off on the request and submit it to his superintendent who also had to approve the request.

Foss testified that when he was notified that he would need to lay off employees from his crew, he usually knew which employees needed to be selected. While he always told

Klingbeil and the superintendent who was going to be laid off, he usually never discussed with them the merits of who should be selected. He asserted that neither Klingbeil nor the superintendents questioned his selection for layoff. He recalled only one occasion when he participated in a discussion with Klingbeil, the union business agent, and the union steward about a layoff selection.

Budnik testified that he is responsible for making sure that everything is done safely by his crew. He makes sure that all of the 17 employees in his crew have the necessary supplies and equipment that they need to do their jobs safely. During the course of the work day, Budnik travels around the work site to the various locations where his crew is working. He checks with them to see if they are having any problems or concerns and how their work is progressing. Budnik testified that he not only helps drivers with strapping down loads, he also shows them ways to do it more efficiently. Frith Senior testified that Budnik did not regularly drive a truck and only drove when the regular drivers were “backed up.” Budnik also testified that he has occasionally driven a semi when a driver was absent from work for illness.

While Budnik testified that Klingbeil tells him what to do, he also added: “... but if Vince is unavailable, it’s up to me to make a decision.” He explained that when Frith Senior wanted to work overtime in March 2007, Klingbeil had been in a meeting. Because Klingbeil was unavailable to approve Frith Senior’s overtime request, Budnik authorized the overtime.

3. Conclusion concerning Budnik’s supervisory status

Section 2(11) of the Act defines “supervisor” as:

Any individual having the authority, in the interests of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As the Board held in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 3 (2006), individuals are statutory supervisors if they hold the authority to engage in any one of the 12 supervisory functions. The Board also clarified that “independent judgment” means that “an individual must at a minimum act, or effectively recommend action free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id* at 9.

As Respondent correctly points out, the burden of proving Budnik’s supervisory status under Section 2(11) of the Act rests with the General Counsel. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). Respondent maintains that General Counsel has not been able to do so because the bulk of Budnik’s job consists of routine or clerical tasks and that he did not “assign” or “direct” other Teamsters. Respondent asserts that Budnik’s duties involving the preparation of cost codes are no more than an exercise in data entry and that he had no authority to assign drivers to different vehicles without the general foreman’s authority. Respondent further maintains that Budnik had a nondiscretionary role in

Respondent's disciplinary process. Further, Respondent asserts that Budnik's monitoring the progress of the work and assisting his crew to work safely are not primary indicia of supervisory status. Respondent relies in large part upon the Board's analysis in *Shaw, Inc.*, 350 NLRB No. 37 (2007), in its assertion that construction foremen with similar duties and responsibilities have not been found to be supervisors by the Board. In *Shaw*, the Board specifically found that the foremen in issue performed essentially as lead persons at the job site, working side-by-side with the other crew members, directing crew members in the performance of routine tasks and in accordance with the employer's instructions. The Board did not find that the foremen played a significant role in the disciplinary process or exercised discretion in determining whether to complete disciplinary forms. There was insufficient evidence that these foremen exercised independent judgment in allowing employees to leave early and there was no evidence that foremen could affect employees' pay. The foremen earned only 50 cents more an hour than operators on the job and \$5 more an hour than the laborers with whom they worked.

In comparing the duties and responsibilities of the foremen in *Shaw* and those in the instant case, it is apparent that the foremen in *Shaw* were more limited in their exercise of independent judgment. The overall record in this case, however, does not support a finding that Budnik and the other foremen clearly possess any characteristic of supervisory authority enumerated in Section 2(11) of the Act. While the foremen can initiate a disciplinary action form, the discipline can be converted to a verbal warning at the discretion of the general foreman. The record evidence contains only two incidents involving a foreman's effective recommendation of discipline. Frith Senior testified that when he was a general foreman, he allowed Klingbeil as a foreman to issue a more severe discipline than he would have personally chosen for the employee. Frith Senior's testimony in this regard is not given great weight inasmuch as it is not only self-serving, but also subjective.

A second example of an effective recommendation for discipline was seen in Foss's recommendation to issue a written warning to an employee and his superintendent's approval without any apparent additional review. As pointed out by Respondent, the general foreman was not present during Foss's shift and Foss consequently assumed duties and responsibilities that would have normally been exercised by the general foreman on first shift. The fact that Foss exercised greater independence and discretion in the absence of a general foreman was unique to Foss and not indicative of Budnik's authority and independence.

The only specific evidence that Budnik acted independently of Klingbeil was the one instance that he told Frith Senior that he could work overtime on March 7. As is discussed more fully in a later section of this decision, this authorization for overtime from Budnik was given after Frith Senior's repeated attempts to get the authorization from management. When Budnik told Frith Senior that he could work overtime, Klingbeil had been in a meeting and Budnik was aware that management "really needed" Frith Senior to work that night. Overall, I don't find that Budnik functioned with the independent judgment envisioned by the Board in *Oakwood Healthcare, Inc.* or that he possessed or exercised other supervisory indicia enumerated in the Act.

4. Conclusion concerning Budnik's agency status

Counsel for the General Counsel submits that even if it is determined that Budnik is

not a supervisor, he is nevertheless an agent of Respondent and his conduct is imputable to the Respondent. I agree.

5 The Board applies common law principles when determining whether an employee is
an agent of the employer. Apparent authority “results from a manifestation by the principal to
a third party that creates a reasonable basis for the latter to believe that the principal has
authorized the alleged agent to perform the acts in question.” *Southern Bag Corp. Ltd.*, 315
NLRB 725, 725 (1994). Under section 2(13) of the Act, the question of whether the specific
acts performed were actually authorized or subsequently ratified is not controlling. The test
10 for determining agency status is whether the alleged agent’s position and duties, and the
context in which the conduct occurs, establish that employees would reasonably believe that
the employee in question was reflecting company policy and speaking and acting on behalf of
management. *Albertson’s, Inc.*, 344 NLRB No. 141, slip op. at 1 (2005); *Pan-Oston Co.*, 336
NLRB 305, 306 (2001).

15 Even if the foremen do not meet the criteria for supervisory status under Section 2(11)
of the Act, the record supports a finding that rank-and-file employees would reasonably
believe that they speak and act on behalf of management. Unlike rank-and-file employees,
foremen are selected for their position by Respondent’s superintendents and receive a dollar
20 more an hour than the other employees. Consistent with the general foremen, the foremen are
given the distinction of a stripe on their hat. Using a company car, the foremen travel to the
different areas of the work site to monitor the work performance of the rank-and-file
employees. Unlike traditional lead persons, the foremen do not work side-by-side with the
rank-and-file employees at the work site. The record reflects that the foremen primarily
25 perform rank-and-file work only to relieve or to instruct an employee. The foremen attend
safety meetings with general foremen and superintendents. Even more importantly, the
foremen conduct their own meetings with employees in which they communicate
management’s concerns about various safety and production issues. Foremen not only initiate
and sign disciplinary warnings, but also attend disciplinary meetings. Employees contact
30 their foremen if they have questions or requests about their assignments or overtime and
employees’ requests for time off are submitted to their foreman.

Foss testified that he specifically assigned employees to certain jobs based upon their
skills, abilities, and attitudes. He testified without contradiction that he initiated discipline
35 and effectively recommended discipline for employees in his crew. He also testified that he
effectively recommended employees for layoff and for time off. Respondent argues that
Foss’s exercise of authority is unique because he functioned without the benefit of a general
foreman on his shift. While the absence of a general foreman may have given him the
opportunity to act more independently than the foremen on day shift, his doing so actually
40 augments General Counsel’s argument that foremen are agents and act with Respondent’s
apparent authority. The fact that Respondent allowed Foss to function for 15 months without
the presence of a general foreman on night shift would reasonably indicate to employees that
he acted with management’s authorization.

45 Budnik testified that although the general foreman tells him what to do, it is up to him
to make decisions when the general foeman is unavailable. Specifically, he testified that
when Frith Senior had wanted to work overtime in March 2007, Klingbeil had been in a
meeting. Because Klingbeil was unavailable, Budnik authorized the overtime. Clearly

Budnik and the other foremen were conduits between management and the employees. Based upon their undisputed duties and responsibilities, employees would reasonably believe that Budnik's statements to employees were based upon knowledge and apparent authority from Respondent. See *D & F Industries*, 339 NLRB 618, 620 (2003); *Cooper Hand Tools, Division of Cooper Industries, Inc.*, 328 NLRB 145, 146 (1999). As discussed further in this decision, Budnik's statements to Frith Senior and Frith Junior were consistent with other coercive statements and conduct by Klingbeil. Thus, I find that during the pertinent time period, Budnik was an agent of Respondent and his statements and conduct are imputed to Respondent.

D. The Alleged Violations and Conclusions

1. The alleged threat of February 2007

a. Frith Senior's testimony

Frith Senior testified that working overtime on Saturdays was voluntary in February 2007. He acknowledged that sometime around the middle or end of March, overtime became mandatory. Frith Senior explained that when overtime was voluntary, it was assigned by seniority. He maintained that overtime was offered to the employees with the most seniority. If there were not enough volunteers, overtime could be required of those employees with less seniority. Although Frith Senior had several conversations with Klingbeil about overtime, he recalled a specific conversation in February 2007. Frith Senior testified that when Klingbeil asked him to work overtime on Saturday, he told Klingbeil: "You know, Vince, my kids are grown. My house is damn near paid for and I've been working Saturdays all my life." Frith Senior told Klingbeil that he would rather have the time off to be with his wife and he suggested that Klingbeil let some of the younger employees who have young families and mortgage expenses work the overtime. Frith Senior told Klingbeil that he was too close to retirement and he would rather have the time to himself. Frith Senior recalls that while Klingbeil said that he would adjust Frith Senior's hours to 40 hours per week, he also told Frith Senior: "I've got your pension in the palm of my hand and I can throw it in the garbage any time I want." Frith Senior recalls that Union Steward Kevin Tatroe, Budnik, Dispatcher Stan Nizynski and Foreman Dave Plasky were present. Frith Senior maintained that Klingbeil never told him that he was required to work on Saturday.

b. Respondent's evidence

Respondent points out Frith Senior's admission that he refused to work on Saturday when requested to do so by Klingbeil. Frith Senior admitted that he told Klingbeil that he didn't want to work the overtime and that Klingbeil should give it to the employees with less seniority. Although Frith Senior contends there was a contractual basis for requiring the employees with less seniority to work the overtime, he acknowledges that he has never read the entire PLA. Frith Senior admits that his understanding of seniority is simply "the way that seniority has worked since seniority was invented." Frith Senior also acknowledged that he told Klingbeil that he preferred to work overtime on days during the week "when he was already there."

Glynn testified without contradiction that the Project Labor Agreement (PLA)

“supersedes a portion of the local collective bargaining agreements that applies to the individual trade unions working at the project. The addendum to the Teamsters Local 200 Area Agreement specifically identifies each provision of the agreement that has been superseded by the PLA. Article 12 of the agreement; dealing with working hours and overtime, is specifically superseded by the PLA. While Article IX of the PLA deals with hours and shift times, there is no provision that defines or explains the assignment of overtime. Article II, however, gives the Respondent the right to manage, control, and coordinate all project construction work by determining work scheduling; including the right to assign overtime work. Glynn also confirmed that Respondent has the contractual authority to require or mandate employees to work planned overtime and employees may be disciplined for their refusal to work planned overtime.

c. Conclusion

Counsel for the General Counsel asserts that an employer violates Section 8(a)(1) by threatening an employee with unspecified reprisals for engaging in union and/or protected concerted activity. Specifically, Counsel further maintains that when Frith Senior told Klingbeil that he was not going to work overtime on Saturday, he was exercising and seeking to enforce seniority past practice right. As Counsel for the General Counsel correctly points out, the Board has long held that certain employee complaints to management may constitute protected activity when they are an attempt to enforce the provisions of an existing collective bargaining agreement. *White Electrical Construction Co.*, 345 NLRB No. 90, slip op. at 1 (2005). *Interbero Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enf'd. 388 F.2d 495 (2nd Cir. 1967). In its decision in *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984), the Court noted that an employee need not even make explicit reference to collective bargaining in order to bring the employee within the protection of the Act.

Although Frith Senior might have had the protection of the Act had he attempted to police or monitor the collective bargaining agreement, the undisputed facts of this case do not support such a finding. Admittedly, Frith Senior did not even know if planned overtime was contractually determined by seniority. His assumption that he could not be compelled to work overtime because of his seniority was based upon an erroneous conclusion that seniority is always applicable. The record evidence reflects that Respondent had the right to assign overtime and the employees' seniority did not restrict such right. Klingbeil specifically denied that he ever told Frith Senior that he had his pension in the palm of his hand and that he could throw it in the garbage at any time that he wanted. Although Frith Senior recalled that Plasky and Nizynski had been present when Klingbeil made the statement, both denied having heard it. Frith Senior additionally recalled that Budnik and Union Steward Kevin Tatroe were present during the conversation. Although Budnik testified, he was not specifically asked about the conversation. Tatroe did not testify. In considering all the witness testimony concerning this specific allegation, I credit Frith Senior's testimony. While crediting Frith Senior's testimony, however, I do not find Klingbeil's conduct to violate the Act. Rather than a threat to Frith Senior for engaging in protected activity, the statement was simply a response to Frith Senior's rejection of a work assignment. Frith Senior was not enforcing the provisions of the collective bargaining agreement; he was simply declining to work overtime as requested. Accordingly, I do not find that Klingbeil's statement to Frith Senior in February 2007 violated Section 8(a)(1) of the Act as alleged in paragraph 5 of the consolidated complaint.

2. The alleged threat of March 19, 2007

Frith Junior worked as a Teamster driver for Respondent for approximately a year and a half before his discharge in May 2007. On March 12, 2007, he was suspended for seven days for not properly strapping a load. After receiving his suspension, Frith Junior telephoned his father (Frith Senior) and told him that he was going to the union hall to file a grievance concerning his suspension. He asked his father to meet him there as well. Frith Senior and his son met with Union Business Agent Mike Gurich, Union President Tom Bennett, Secretary-Treasurer Tom Millonzi, and Construction Business Agent Tom Benevenuto about the grievance. The grievance was initiated and signed by Union Steward Kevin Tatroe and was submitted to Respondent on March 16, 2007.

Frith Senior attended a scheduled safety meeting the following Monday, March 19, 2007. Frith Senior recalled that at the time of the meeting, Klingbeil was upset because a number of employees had not shown up to work on the previous Saturday as scheduled. Klingbeil told the employees that if they were scheduled to show up for work on Saturday and did not show, he would walk them to the gate the following Monday morning. Frith Senior saw Klingbeil again during his morning break at the connex. Frith Senior testified that at the conclusion of the break, Klingbeil pulled him aside and told him: “You better keep your fucking mouth shut to the bastards down at the hall because I’ll be here until the end of the job.” Frith Senior responded: “Well, you should say something to the other eight guys that went down there with us.” In his testimony, Frith Senior confirmed that there had not been eight other employees and he was “just bluffing” with Klingbeil. Frith Senior recalled that Nizynski, Plasky, Tatroe and possibly Budnik were in the area during the conversation.

While Klingbeil testified that he had no reason to be mad at Frith Junior, for going to the union hall, he acknowledged that he had disagreements with Frith Senior. Klingbeil went on to explain that immediately after the new Union officers were elected, he began having problems. He asserted that it was his belief that every time that anything happened on the work site, Frith Senior went to the Union and lied to them about him and how he did his job as general foreman. He acknowledged that on two to three occasions, he confronted Frith Senior about going to the Union. Klingbeil did not, in fact, deny that he made the statement as alleged by Frith Senior. While Nizynski and Plasky generally denied ever hearing Klingbeil threaten Frith Senior about going to the Union, they were not specifically asked if they were present during the March 19 conversation. Tatroe did not testify.

Although Respondent’s counsel submits that Klingbeil was only angry at Frith Senior because he believed that Frith Senior told lies about him, Klingbeil’s testimony reflects Klingbeil’s animus toward Frith Senior for his contact with the Union. Despite his belief that Frith Senior said disparaging things about him to the Union, Klingbeil’s unspecified threat for talking with the Union was nevertheless a violation of Section 8(a)(1) of the Act. *Tufts Bros., Inc.*, 235 NLRB 808, 814-815 (1978). I therefore find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6(a) of the complaint.

3. The disallowance of overtime for Frith Senior on March 19, 2007

Paragraph 6 (b) of the consolidated complaint alleges that Respondent refused to allow

Frith Senior to work overtime on March 19, 2007. Frith Senior was the only Teamster working at the Spang Farm work site during the afternoon of March 19, 2007. As foreman for the Boilermakers working at the Spang Farm site, Bob Fausch coordinated the loads and work at the site. Rausch told Frith Senior that it did not appear that the Boilermakers would finish on time that day and he asked Frith Senior if he could work overtime for a couple of hours. When Frith Senior called Nizynski on the CB radio, Klingbeil answered the call. Frith Senior told Klingbeil that the Boilermakers were working two hours overtime and asked if he was working overtime as well. Klingbeil replied: "No, you're not staying any overtime. Bring it in and I'll send somebody else out there." Frith Senior did as directed and returned to the connex at the end of his regular work day. Although Frith Senior told Union Steward Tatroe that he wanted to file a grievance about the denial of overtime, Tatroe discouraged him from doing so.

Frith Senior testified that the Teamsters were assigned to different working areas on a rotating basis. He explained that Budnik had devised a rotation plan for assignment to the different areas of the work site. He explained under the rotational plan, the Teamsters worked the same hours as the other crafts in the area where they were assigned. If the craft with whom they were working needed to work overtime, the Teamsters would also work overtime to provide the necessary support. Teamster Scott Olson also testified that if Teamsters were assigned to work at Spang Farm, they worked the same overtime hours as the other crafts who were working at Spang Farm. Olson also confirmed that Teamsters follow the same overtime practice at the North Yard.

As pointed out by Counsel for the General Counsel, Klingbeil did not address in his testimony the March 19, 2007 refusal to allow Frith Senior to work overtime. Although Respondent denies the supervisory status of Budnik, Budnik was Respondent's witness who addressed this allegation. Budnik testified that while Frith Senior "never wanted to stay overtime at all," he had wanted to work overtime on March 19. Budnik explained however, that the employees who "came in and busted their humps every day were awarded the overtime." Budnik asserted "we replaced Tom Frith Senior on that position for that day." Thus, the record reflects that while it was the usual practice to allow employees to work the same overtime as the crafts they were supporting, Respondent specifically varied the practice and deliberately denied overtime to Frith Senior. I find it significant that Klingbeil denied this overtime to Frith Senior only hours after he had threatened Frith Senior with unspecified reprisals for his talking with the Union. Accordingly, the total record evidence supports a finding that Respondent's failure to allow Frith Senior to work overtime on March 19, 2007 was discriminatorily motivated and violative of Section 8(a)(1) as alleged. Respondent has not demonstrated that it would have taken the same action in the absence of Frith Senior's protected activity. Therefore, I find merit to paragraph 6(b) of the consolidated complaint.

4. The alleged threats of March 20, 2007

On March 20, 2007, Frith Junior took his lunch break in the connex lunchroom. While he was eating lunch, Klingbeil stopped by his table. Frith Junior testified that Klingbeil asked him why his father went to the hall, "starting shit." When Frith Junior did not respond, Klingbeil added: "Now I'm no longer in the punishing mode. Now I'm in the revenge mode." Frith Junior was unaware of whether anyone else heard Klingbeil's comment.

Frith Senior also took his lunch break at the connex on March 20, 2007. Before returning to work, he encountered Klingbeil near the port-a-potty outside the connex. Frith Senior testified that Klingbeil told him: “Kevin said you tried to file a fucking grievance.” When Frith Senior confirmed that he had wanted to do so, Klingbeil responded: I’m no longer in punishment mode, I’m in the revenge mode and I doubt if you’ll last until the end of the week.” Frith Senior simply responded: “Whatever Vince.” No one testified that they overheard the conversation.

Frith Junior testified that closer to the end of the day on March 20; he had an additional conversation with Klingbeil. Klingbeil once again asked him why his father went to the hall “starting shit.” Frith Junior recalled that he replied: “We have the right to go to the union hall if we have a problem with anything down here.” Frith Junior recalled that Klingbeil responded by reminding him that he was no longer in a punishing mode, but was in revenge mode.

Klingbeil denied that he ever told Frith Junior that he was in “revenge mode.” Although he testified that he did not recall talking with Frith Senior near the port-a-potty, he denied making the statement about his hearing that Frith Senior had tried to file a “fucking grievance.” Klingbeil asserted, however, that there were occasions when he spoke with Frith Senior about trying to stay out of trouble so that he could last until the end of the job. Klingbeil testified: “I mean I was doing everything I could to make him as comfortable as I could, and I had a lot of people upset and mad at me because I was doing it.” Klingbeil went on to add that other employees were mad because they thought that he favored Frith Senior. Klingbeil asserted that he and Frith Senior were friends and that he had repeatedly urged Frith Senior to stay on the job. He contended that he told Frith Senior to just “... enjoy the bus. Make the money. Enjoy the rest of the job.” Klingbeil, in fact, depicts his relationship with Frith Senior as not only friendly, but almost fraternal. At the same time, however, he admits that he believed that Frith Senior was talking with the new Union administration and telling lies about him.

Despite Klingbeil’s attempt to describe his discussions with Frith Senior about Frith Senior’s behavior as benign and friendly, Klingbeil also admits that he spoke with Frith Senior about how his “staying out of trouble” could keep him working until the end of the job. The total record evidence indicates, however, that the “trouble” in which Frith Senior had engaged was Frith Senior’s talking with the new Union administration about Klingbeil. Accordingly, I credit the testimony of Frith Senior and Frith Junior and I find that Klingbeil made the threats as alleged in paragraphs 7 and 8 of the consolidated complaint.

5. The alleged harassment on March 22, 2007

On March 22, 2007, Frith Senior was assigned to work at Spang Farm. He testified that at approximately 2:00 p.m., he realized that the work at that location would not finish at the regular time and that the employees at the Spang Farm location would need to work overtime. Frith Senior called Nizynski to let him know that they would probably work overtime. When Foreman Fausch confirmed at 2:30 p.m. that the employees would definitely work overtime, Frith Senior again called Nizynski and asked if he would also work overtime. Nizynski simply told him “Well, we’ll get back to you.” Frith Senior recalled that when he had heard nothing, he again radioed the dispatcher. Foreman Budnik answer the call and told

Frith Senior to meet him at one of the lay-down yards that was located closer to the connex. When Budnik did not arrive at the lay-down yard as promised, Frith Senior went to the connex. When Frith Senior arrived, Budnik came over to Frith Senior's truck and told him that he could stay for the overtime. Frith Senior responded: "Rick, you know this is bullshit. I'm not playing Vince's game. You jacked me around all afternoon and then tell me right at the last minute." Frith Senior testified that by that time, there were already employees lining up at the time clock to go. He told Budnik that he was going home.

The undisputed evidence reflects that Budnik informed Frith Senior that he could work overtime on March 22, 2007 and that Frith Senior declined the opportunity and went home. Counsel for the General Counsel maintains that Respondent harassed Frith Senior by waiting for an hour and a half to tell him that he could work the overtime. Frith Senior maintains that he first notified the dispatcher at approximately 2:00 p.m. that the other craft employees would probably work overtime. Admittedly, it was not until approximately 2:30 p.m. that Frith Senior notified the dispatcher that the other employees were definitely working overtime. At 3:00 p.m. Frith Senior again called dispatch to find out if he would work overtime. Finally, at approximately 3:23 p.m., and after Frith Senior went back to the connex, Budnik told him that he could work the two hours overtime. Budnik testified that when he told Frith Senior that he could work overtime, Frith Senior replied: "Fuck it, I'm not staying. Fuck Klingbeil. He wants to play his fucking games. I'm going right up to the hall." Except for the additional expletives credited to Frith Senior, Budnik's testimony essentially tracks Frith Senior's testimony about the conversation between Frith Senior and Budnik on March 22, 2007. Both the testimony of Budnik and Frith Senior reflect that Frith Senior blamed Klingbeil for the delay in confirming that he could work overtime. Frith Senior, however, did not contend that he ever spoke with Klingbeil about working overtime or that anyone told him that Klingbeil specifically delayed in authorizing his overtime. Budnik testified that because Klingbeil had been in a meeting, he had not been able to get any earlier confirmation on Frith Senior's overtime. There is no evidence to contradict Budnik's testimony. Frith Senior's only evidence that Respondent specifically delayed in confirming his overtime was his own speculation and suspicion. I do not find Frith Senior's personal conclusions as sufficient evidence of harassment. Accordingly, the record evidence does not support a finding that Respondent unlawfully harassed Frith Senior by refusing to answer a request for overtime as alleged in complaint paragraph 9. I do, however, credit Budnik's testimony that Frith Senior threatened to go the Union because he believed that Klingbeil was "playing games" with him.

6. The allegations involving Frith Senior's transfer to the water truck

a. The alleged threats and reassignment on March 30, 2007

On March 30, 2007 Frith Senior had been assigned to work at the North Yard with the Ironworkers for approximately a week. At that time, Frith Senior was assigned to drive a new Mack truck with air ride and air conditioning. Everything worked well on the truck and Frith Senior described it as "top of the line." During the afternoon of March 30, Budnik came to the work area and informed Frith Senior that Klingbeil had reassigned him from the semi to the water truck. When Frith Senior asked Budnik why he was being reassigned, Budnik

replied: “Well, because I can and because Frank⁵ wants your truck.” Budnik then added: “Well, maybe now you’ll stay away from the damn hall.” No one else was present during the conversation.

5 The water truck is used to control the dust on the roads at the work site. Frith Senior testified that because there is both a first and second shift driver for the water truck, the first shift water truck driver is not likely to get any overtime work. He also asserted that the water truck driver is more likely to be sent home when there is rain or snow.

10 **b. The alleged threat of April 4, 2007**

April 4, 2007 was the first day that Frith Senior was assigned to the water truck. When he arrived at work, he asked Klingbeil if someone would show him where and how to fill the truck with water. Klingbeil initially told him that he should already know how to do that. Frith Senior explained that he did not. Klingbeil sent him to the truck and told him to wait. After waiting in the truck for approximately 20 minutes, Frith Senior again went into the connex and asked Klingbeil to show him how to use the truck. Frith Senior testified that Klingbeil began screaming at him and ordered him back to the truck. Frith Senior recalled that Klingbeil told him: “You stay in the truck until I tell you. I’ll send somebody out there.” Frith Senior testified that after he had waited in the truck for approximately an hour, Budnik came out to the truck. Budnik told Frith Senior to follow him to the old plant to fill the truck with water. While Budnik and Frith Senior were waiting for the truck to fill, Frith Senior asked: “Why the hell was I put on this damn truck?” Budnik told him: “We thought that you would be happier there.” When Frith Senior explained that he had been happier doing his former job, Budnik told him that he has been reassigned because he would not work overtime. Frith Senior protested and argued that he had been trying to work overtime and told him: “Every damn time I get some I get pulled off of it.” Frith Senior asserted that Budnik responded: “Well, maybe if you would stay [away] from the hall things will get a little better.” In response to further prompting on direct, Frith Senior also recalled that Budnik added: “If our business was kept in-house, things would get a little better.” No one else was present during the conversation.

c. Conclusions

35 Counsel for the General Counsel points out that Respondent’s assignment of Frith Senior to the water truck disadvantaged Frith Senior in two distinct ways. First, this assignment precluded Frith Senior from overtime because there was a second shift water truck driver who took over the vehicle at the end of first shift. Secondly, because it was early spring, the roads were often wet with rain and snow and the water truck drivers were often sent home without getting a full work week. Teamster driver Scott Olson testified that spring was not a desirable time to be assigned to the water truck because of the wetness of the roads and the likelihood of being sent home.

45 Budnik assigned Frith Senior to work the water truck and asserts that working the

⁵ Frank Ardellini had been the Union’s business agent and was voted out of office when the Union’s administration changed in early 2007.

water truck was a “great job.” Budnik testified that the job was a “great fit” for Frith Senior because it allowed him the opportunity to finish out the job and it was an easy fit for the schedule that Frith Senior wanted to maintain. While Budnik did not specifically address the alleged conversations with Frith Senior on March 30 and April 4, he denied that he ever told Frith Senior to stay away from the union hall.

The overall record testimony indicates that both Klingbeil and Budnik were well aware that Frith Senior did not want to be assigned Saturday overtime, and yet he readily accepted overtime during the regular work week. It is undisputed that Frith Senior worked overtime each day during the week prior to March 30, 2007 and Respondent acknowledges that Frith Senior’s transfer to the water truck was triggered by Frith Senior’s specific preferences related to overtime. Respondent asserts that Frith Senior’s transfer to the water truck was “merely another consequence” of Frith Senior’s “refusal to work overtime.”

Klingbeil testified that he “could live without the water truck” on Saturdays and Budnik told Frith Senior that he was being moved to the water truck because he would not work overtime. Budnik also testified that Frith Senior was reassigned from the semi to the water truck because he “refused to work” on Saturdays. Klingbeil, however, testified that Frith Senior was moved to the water truck because Respondent needed somebody with experience running the water truck and also because Frith Senior did not want to work overtime on Saturdays. Respondent’s reasons for the reassignment, however, conflict with other record testimony. While Klingbeil asserted that Frith Senior’s experience was part of the reason for the reassignment, there was no record evidence that Frith Senior had any experience in driving the water truck. In fact, on the first day of his assignment he needed Budnik to go with him to show him how to fill the truck tank. Additionally, even though Klingbeil and Budnik both credited Frith Senior’s failure to work overtime on Saturdays as a basis for the move, Klingbeil admitted that as of April, Frith Senior was working regularly on Saturdays. Klingbeil also conceded that when Respondent implemented “planned overtime” in March, April and May, Saturday overtime was mandatory. Thus, as of the date of the reassignment, Frith Senior was working the mandatory Saturday overtime, negating the credibility of Budnik and Klingbeil’s testimony. Conversely, it is more likely that Budnik’s statements to Frith Senior on March 30 and April 1 reflect the true reason for Frith Senior’s reassignment. In his testimony, Budnik did not specifically address his alleged conversation with Frith Senior on March 30 and April 1. He simply denied telling Frith Senior to stay away from the union hall. By contrast, Frith Senior’s testimony was very specific in relating these two conversations and his testimony was supported by the notes that he made at the time of the incidents. Thus, I find Frith Senior’s testimony to be more credible and I find that the total record evidence supports a finding that Budnik made the statements as alleged. Thus, the overall record evidence reflects that Frith Senior’s assignment to the water truck was his punishment for going to the union and a violation of the Act as alleged in complaint paragraph 10(b). Additionally, I find that in both conversations on March 30 and April 1, Budnik specifically threatened Frith Senior as alleged in complaint paragraphs 10(a) and 11.

7. The alleged refusal to allow Frith Senior to work overtime on April 5, 2007

It rained during the day on April 4 and there were weather predictions that the rain would continue for the rest of the week. At the end of the day, Budnik told Frith Senior that he would be assigned to the off-site warehouse for the rest of the week. Frith Senior denied

that Budnik told him to report directly to the warehouse on April 5, 2007.

When Frith Senior arrived at work on April 5, 2007 he went to the connex and asked Klingbeil if he could just take his two hours of show-up⁶ pay for that day and go home instead of working in the warehouse. Klingbeil told him that he did not have any options and that he was to report to the warehouse to work. While working in the warehouse later that day, the warehouse supervisor asked Frith Senior if he could come in to work for an extra hour the next morning and stay for an extra hour at the end of the next work day. At the end of the day, Frith Senior asked Klingbeil if he could work the extra two hours at the warehouse the following day. Frith Senior recalled that Klingbeil responded: “No, you’re not going back down there because I would not want you to file a grievance against me.” Frith Senior testified that Union Steward Kevin Tatroe, former foreman Dave Plasky, and Budnik were all present during his conversation with Klingbeil.

Budnik testified that rather than reporting directly to the warehouse on April 5, 2007 as instructed, Frith Senior had reported to the connex. Because he had already clocked in, Frith Senior had to be transported to the warehouse by another employee. Klingbeil testified that after working in the warehouse on April 5, Frith Senior wanted to return to work there on April 6. Klingbeil does not dispute that he refused to allow Frith Senior to return to the warehouse job on April 6, 2007. In his testimony, Klingbeil gave two different reasons for his refusal to do so. Initially Klingbeil testified that he refused to allow Frith Senior to return to the warehouse because Frith Senior reported to the connex on April 5 rather than to the warehouse. When talking with Frith Senior, however, he told Frith Senior that he had already assigned another employee to the warehouse for the next day. In his testimony, Klingbeil further asserted that he seldom sent the same employee “all the time” to the warehouse. Klingbeil did not, however, identify the employee who was assigned to replace Frith Senior and he did not identify when such assignment was made.

Klingbeil denied that he refused to allow Frith Senior to work in the warehouse because he was worried that Frith Senior would file a grievance against him. He did not, however, deny that he told Frith Senior that he was not going back to the warehouse because he didn’t want Frith Senior to file a grievance against him. In his testimony, Plasky gave a general denial that he ever heard Klingbeil threaten Frith Senior concerning the filing of a grievance or the potential filing of a grievance. He did not, however, identify whether he had been present or overheard any conversation between Frith Senior and Klingbeil on April 5. Although Budnik testified concerning his involvement in assigning Frith Senior to the warehouse, he did not deny overhearing the alleged conversation between Frith Senior and Klingbeil concerning Klingbeil’s refusal to allow Frith Senior to return to the warehouse. Steward Tatroe did not testify.

It is apparent that as of April 5, 2007 the tension between Frith Senior and Klingbeil had escalated to a point where Frith Senior’s very presence annoyed Klingbeil. Frith Senior

⁶ Under Article IX of the PLA, an employee receives no less than two (2) hours pay at the regular straight hourly rate when no work is provided for the employee. Whenever minimum-reporting pay is provided for employees, they will be required to remain at the Project site available for work for such time that they receive pay, unless released sooner by Respondent.

admitted that when he reported to work on the morning of April 5, he asked for show up pay and the opportunity to go home. It is not surprising that such conduct created even more animosity. But, despite what Frith Senior did to annoy Klingbeil on April 5, 2007, it was Frith Senior's union activity that Klingbeil credited as a basis for refusing to allow Frith Senior to return to the warehouse. Consistent with his testimony on other matters, Klingbeil gave shifting reasons for not allowing Frith Senior to return to the warehouse. While Klingbeil alleges that Frith Senior was not allowed to go back to the warehouse because he initially reported to the connex on April 5, Klingbeil also asserts that Frith Senior was not allowed to go back to the warehouse because another employee was already assigned to the warehouse. Thirdly, Klingbeil asserts that it was his practice not to send the same employee to the warehouse "all the time." Thus, inasmuch as Respondent's shifting reasons are indicative of pretext,⁷ I credit the testimony of Frith Senior and find that Respondent unlawfully refused to allow Frith Senior to work overtime on April 5 as alleged in complaint paragraph 12.

8. The alleged assignment of more onerous work on April 30, 2007

After a week's absence because of a death in his family, Frith Senior returned to work on April 30, 2007. Although Frith Senior was assigned to drive a semi, the tractor was not the newer one to which he had been assigned the previous month. Frith Senior testified that the air conditioning and heater did not function on the tractor and the brakes were defective. He also recalled that one of the wheels was so clogged with mud that the wheel wouldn't slide forward enough to put weight over the axle; causing the wheel to occasionally slip back the wrong way. Frith Senior asked Klingbeil why he was being assigned to that particular vehicle. He recalled that Klingbeil told him: "You'll drive what I tell you to drive." Frith Senior testified that at the time of their conversation, he noticed that the water truck had been repaired and appeared ready to be driven. Klingbeil testified that he assigned Frith Senior to the only semi that was available.

As noted above, the animosity between Frith Senior and Klingbeil began in March and continued to escalate. While Frith Senior asserts that his assignment to the older tractor was harassment, there is no evidence that any other vehicle was available for assignment. Frith Senior had returned from a week's absence and it is not likely or even reasonable that Respondent would have specifically saved the better tractor for Frith Senior to drive upon his return. Although Frith Senior asserts that the water truck had been repaired and was available for assignment, the record contains no evidence to support his speculation. There is no evidence that any other employee was assigned to the water truck or even occasionally drove the truck. Accordingly, there is not sufficient evidence to support a finding that Frith Senior was unlawfully assigned to more onerous work duties and undesirable equipment as alleged in complaint paragraph 13.

⁷ *U.S. Coachworks, Inc.*, 334 NLRB 955, 957 (2001); *Bay Metal Cabinets, Inc.*, 302 NLRB 152, 173 (1991).

9. The alleged closer scrutiny

a. The incident at Spang Farm

5 Frith Senior was the only Teamster assigned to work at Spang Farm on May 3, 2007. He testified that it is usually good to work at that site because it is so far off the beaten path that the foremen seldom come to the site. Frith Senior testified that throughout the day, he observed Budnik driving around the site and also parked at different locations at the site. Frith Senior testified that Budnik appeared to be watching “every move” that he made. Frith Senior testified that Budnik was watching him at the site for at least six hours during the work day. He explained that previously when he had worked at that site, he seldom saw Budnik more than two or three times during the entire work week. Frith Junior testified that when he worked at the Spang Farm location, he seldom ever saw Budnik more than once a day.

b. The incident at the North Yard

15 On May 7, 2007, Frith Senior was assigned to work in the North Yard. Frith Senior testified that normally when he worked in the North Yard, he usually saw Budnik only once or twice during the day. He testified that on May 7, however, he saw Budnik at various times during the work day. He recalled that on two different occasions he observed Budnik watching him from the transportation bus that came to the site. He also testified that on another occasion, Budnik watched him from a hidden point behind a load of iron. During the afternoon, Frith Senior was scheduled to take a load to a different lay-down yard. He asserted that as he was attempting to leave the North Yard, Budnik blocked his truck for approximately five minutes and prevented his leaving the North Yard.

c. Conclusion

30 Scott Olson testified that on two occasions, he observed Budnik watching Frith Senior work while parked at Frith Senior’s work site. He recalled one incident at the North Yard and another incident at Spang Farm. He estimated that he observed Budnik watching Frith Senior for approximately five to ten minutes. He could not recall the exact dates; however, he estimated that it may have been within two weeks of Frith Senior’s discharge. Olson testified that he never saw Budnik watching any other employees as he did Frith Senior. Frith Junior testified that he worked at the North Yard about once a week. When working there, he usually only saw Budnik once a day.

40 Budnik denied that he sat and watched Frith Senior for six hours while he worked on May 3, 2007. He explained that he had “too much on his plate” to sit anywhere for six hours and that he had 16 other employees to assist in their daily routines. He denied that he ever supervised Frith Senior by sitting in a shuttle or mini-bus driving through the lay-down yard. Budnik explained that he would only use the transportation bus to travel around the site when the foremen’s company vehicle was unavailable. He also denied that he tried to sneak up on Frith Senior by hiding behind a load of iron.

45 Comparing the testimony of Frith Senior, Olson, and Budnik, it appears that Budnik may have come to Spang Farm and to the North Yard more often than his usual practice on May 3 and May 7. The total evidence, however, does not support a finding that Budnik

engaged in the conduct alleged in paragraphs 15 and 16. Frith Senior's testimony that Budnik spent six hours watching him on May 3 is totally incredible. It is not only unsubstantiated, it is also implausible. While it is likely that Respondent may have welcomed any missteps by Frith Senior, it is unlikely that Respondent could have spared Budnik for six hours to scrutinize Frith Senior's work. It is even more unlikely that Budnik spent a major portion of his day on May 7, riding through the work site on the transportation bus. Such conduct, which would have been observed by other employees, would have raised suspicions and caused a distraction and disturbance among the other employees. There is simply insufficient credible evidence to support these allegations and I find no merit to complaint paragraphs 15 and 16.

10. Frith Senior's union activities

On June 1, 2007, Frith Senior became the alternative union steward at the jobsite. As the regular union steward worked second shift, Frith Senior was responsible for all the steward's duties on first shift. As steward, Frith Senior was responsible for handling grievances and representing employees during discipline. Frith Senior testified that as steward, he spoke with Klingbeil about employee Scott Olson who had repeatedly been sent home for his physical inability to perform some of the work. Frith Senior asked if Olson could be assigned to a different job where he would not have to do heavy lifting. During the conversation, Frith Senior suggested that Olson probably had grounds for a grievance. A few days later, Nizynski asked Frith Senior why he was defending Olson as much as he was. Frith Senior explained that because he was union steward, it was his job to defend Olson. Nizynski suggested that if Frith Senior would let Klingbeil do what he had to do, perhaps Klingbeil would let him (Frith Senior) park in a parking lot that was closer to the connex. Frith Senior replied: "I'd rather park down at the damn Ryan Road Truck Stop and walk to work before I'd kiss Vince's [Klingbeil] fat ass."

Scott Olson testified that when he previously worked for the Respondent, he experienced tendonitis in his shoulder when he drove the semi tractors. On numerous occasions he spoke with his union steward, Frith Senior, about his assignment to the semi and the related problems with his shoulder. On June 20, 2007, Frith Senior participated in a disciplinary meeting with Scott Olson. The meeting was attended by Glynn, Klingbeil, Budnik, and Larry Brown from Labor Relations. Glynn informed Olson that he was terminated because he could not perform the work. Frith Senior interjected that although Olson was able to perform the work for which he was hired, he was not able to do the work to which he had been assigned. Frith Senior went on to explain that Olson had been hired as a dump truck driver and that Olson could continue to do that work because it did not interfere with his health problems with his shoulder. Frith Senior argued that it was not appropriate to terminate Olson while there were other drivers who had the same class license as Olson and they were permitted to do other work. After checking the records, Glynn confirmed that Olson was performing a job requiring a "Class B" license when he had a "Class A" license. He reversed the decision to terminate Olson and Olson was allowed to continue to work as a dump truck driver.

11. Frith Senior's discharge

a. Frith Senior's evidence concerning the June 26, 2007 incident

5 On June 26, 2007, Frith Senior had been assigned to the older tractor for approximately a month. The tractor had continued to have brake problems and inoperable air conditioning. There was no inside switch to raise the axles on the trailers. Because a block was missing on the fifth wheel, the fifth wheel tilted back too far. Although Frith Senior reported the problems with this tractor in his daily vehicle reports, the vehicle was not
10 repaired.

On the morning of June 26, Nizynski dispatched Frith Senior to the bowl to pick up an empty trailer and told him to bring it back to the Teamster yard. Frith Senior performed his vehicle inspection and went to the bowl as dispatched. When Frith Senior arrived at the bowl,
15 he discovered that the stretch trailer was not empty. A stretch trailer has the capacity to be stretched longer or shorter as needed. Frith Senior told Nizynski that the trailer was not empty and that the trailer was stretched out to 80 feet long and was loaded with three 60-foot lifting beams. He also reported that the beams were held down with brand new straps. Klingbeil was present in the connex when Frith Senior called and he overheard Frith Senior's
20 conversation with Nizynski. Nizynski told Frith Senior that he should go ahead and pull the trailer to the top of hill to Area 51. Following Nizynski's directions, Frith Senior hooked the tractor to the trailer and pulled out. He made one left turn successfully and drove down the road. As he began to make a second left turn, the fifth wheel flipped backward as it had done previously and the trailer came down on the frame of the tractor. Frith Senior immediately
25 radioed Nizynski and asked him to send Klingbeil. Frith Senior recalled that as soon as he finished the call, he looked through the back windshield and saw both Klingbeil and Budnik sitting in a car just past where he had turned the trailer. Klingbeil got out of the car and told Frith Senior that he (Frith Senior) would have to be on drugs to have pulled a load as he did. Even though Frith Senior asserted that he had done so because of Nizynski's directive,
30 Klingbeil told him that he should never have pulled the load.

Klingbeil ordered a large construction forklift to lift the edge of the trailer and permit the straightening of the tractor. Using a crane, the beams were then unloaded from the trailer. Frith Senior then shortened the trailer, reloaded the beams, and strapped them down for
35 transporting. Before he began to move the trailer, however, Klingbeil told him that he had to take a drug test. There is no dispute that drug tests are routinely ordered with certain on-the-job accidents. Because the initial drug screen at the job site did not have either a positive or negative result, the test had to be sent to an off-site laboratory (lab) for additional testing. Frith Senior was suspended pending the test results.

40 Frith Senior testified that on June 28, 2007, Larry Brown from Respondent's Labor Relations Department telephoned him and told him to report to work. Frith Senior told Brown that he lived two hours away from work and that he had been working in his basement all day. He told Brown that it would be quitting time by the time that he took a shower and
45 drove to the facility. Brown agreed that he could report to work the following day.

When Frith Senior reported to work the next day, he was informed that he would have to take another drug test. Glynn testified that when the initial drug specimen was sent to the

lab, the container leaked in transit and the lab rejected the specimen for further testing. Frith Senior testified that when he took the second test, the results again reflected a non-negative reading. Frith Senior was again suspended. The following week, Sharon Tooze from Respondent's Labor Relations Department telephoned Frith Senior and told him that his second drug test had been negative and that he could return to work. On the way to work, he contacted Union Business Agent Gurich and told him that everything had finally been resolved and that he was going back to work.

b. The discharge meeting

When Frith Senior arrived at work, he picked up his badge and was told to wait. After waiting for about an hour, Frith Senior was surprised to see the arrival of Gurich. Gurich told him that the company had notified him to come to the office. Frith Senior and Gurich then met with Glynn as well as Respondent's Acting Manager of Environmental, Safety, and Health; Karl Klink and Tom Roundtree; the Environmental, Safety, and Health representative, who had investigated the June 26, 2007 incident.⁸ Although Budnik also participated in the meeting, Gurich testified that he was not present as a steward or as a representative for the Union. Glynn told Frith Senior that he was terminated because he pulled an unsafe trailer on June 26 and that this action constituted his second offense. Frith Senior argued that not only had he never had a first offense, he had only pulled the trailer because he was told to do so by Nizynski.

Frith Senior recalled that when Nizynski joined the meeting, he initially denied that he told Frith Senior to pull the trailer. Frith Senior recalled that eventually Nizynski confirmed that he had told Frith Senior to move the trailer. Nizynski had contended, however, that he had assumed that it was ready to go because Frith Senior had told him that the load was strapped. Nizynski denied in the meeting that Frith Senior told him that the trailer was stretched too far.

After Nizynski left the room, Frith Senior again asserted that he had never had a first offense. Glynn handed him a disciplinary warning dated August 11, 2006. The written discipline included the following written explanation:

Employee made a derogatory racial remark about his supervisor creating a hostile work environment in violation of the Company's Equal employment opportunity policy.

While the document was signed by the general foreman and the superintendent, there was a notation that the employee had refused to sign the document on August 16, 2006. Frith Senior responded "I never saw this before in my life." Frith Senior denied that he had ever seen the document and asked who had signed it. Glynn told Frith Senior that the document had been signed by John Swan and then Glynn asked Swan to join the meeting.

When Swan joined the meeting, Gurich asked Swan where the meeting had taken

⁸ Glynn recalled that supervisor Jim Honer was also present during the termination meeting with Frith Senior.

place in which Frith Senior was given the 2006 discipline. Gurich testified that initially Swan stated that had occurred in Glynn’s office and that Glynn had been present for the meeting. Gurich recalled that Glynn interjected that he had not been present in such a meeting. At that point, Swan responded: “Oh, yea. That’s right. It was in a different trailer. Gurich recalls that he then asked Swan if it was not possible that the meeting or discussion had actually been in the parking lot. Swan agreed that the meeting may have been in the parking lot. Swan also acknowledged that Frith Senior had never received a copy of the discipline. He told Frith Senior” “We knew you wouldn’t sign it anyway.” Frith Senior reminded Glynn: “Greg, you know how pro union I am. You know if I’d have got a reprimand I’d have filed a grievance in half a heartbeat.” Glynn told Frith Senior that he didn’t really know that for sure. Frith Senior again asserted that he had never previously seen the discipline and if he had ever received anything like that, he would have immediately filed a grievance.

During the meeting, Glynn gave Gurich a hand-written statement that was signed by employee Don Dlobik and dated August 11, 2006. Dlobik reports in the hand-written statement that during a conversation on August 10, 2006, Frith Senior had referred to Superintendent John Swan as “That F---N-----.” The note also references an unrelated matter concerning Dlobik’s conversation with Frith Senior on August 11, 2006 concerning another Teamster driver. Dlobik documented that Frith Senior had told him on August 11, 2006 that another driver had an accident and had not reported it. In the August 11 conversation, Frith Senior had opined that the other driver would soon be fired and Dlobik would no longer have to be assigned to the warehouse. Gurich requested that Dlobik be brought into the meeting. After Dlobik joined the meeting, Gurich asked him when he wrote the statement and Dlobik replied that he had done so immediately after the August 10, 2006 incident. When Gurich asked why the statement was actually signed the day following the alleged incident, Dlobik replied that he did not know.

c. The alleged prior discipline

(1) Frith Senior’s account of the August 2006 parking lot discussion

Frith Senior recalled that approximately 11 months prior to his termination, Klingbeil and he were walking across the parking lot and they met John Swan and Bob Carr. Carr told Frith Senior that he wanted to speak with him alone. Frith Senior recalled that when they were alone, Carr told him that Don Dlobik had accused Frith Senior of calling John Swan “a fucking nigger.” Frith Senior vehemently denied doing so. Carr and Frith Senior then returned to where Klingbeil and Swan were standing in the parking lot. Frith Senior told Swan that as long as Swan had known him, he (Frith Senior) had “never played that prejudice bullshit.” Frith Senior told Swan that he had never said anything like that and he asserted that Dlobik was just angry because Frith Senior had given him a reprimand a few weeks earlier while he was the general foreman. When Frith Senior told Swan that he had never said anything like that about him, Swan replied, “Well, Tom, that’s all I needed to hear.” Frith Senior and Klingbeil continued walking across the parking lot and Carr and Swan went on their way. Frith Senior believed that his conversation with Swan ended the matter. Frith Senior denied that at any time during this conversation in the parking lot there was ever any mention of his receiving any discipline. He denied that anyone in the conversation carried with them anything that even resembled a disciplinary warning. Frith Senior testified that he never saw the August 2006 disciplinary warning prior to his July 2, 2007 discharge.

(2) Frith Senior’s recall of Dlobik’s discipline

Frith Senior was the general foreman in July 2006. Because July 4, 2006 fell on a Tuesday, employees were scheduled to receive a four day weekend. Frith Senior recalled that during a morning safety meeting with employees prior to the holiday weekend, he solicited volunteers to come in to work in the warehouse on Monday, July 3, 2006. He recalled that Dlobik became really angry that he was being asked to work. Dlobik responded by using profanity, yelling at Frith Senior that he would not work, leaving in the middle of the meeting, and slamming the door. Frith Senior reported Dlobik’s conduct to Glynn and Dlobik was given a seven-day suspension.

12. Respondent’s evidence concerning Frith Senior’s discharge

a. The incident of June 26, 2007

Respondent asserts that Frith Senior was terminated as a result of the June 26, 2007 “near-miss” accident and that the accident occurred after Frith Senior attempted to move an 80 foot stretch trailer loaded with three 50-60 foot I-Beams weighing more than 50,000 pounds. The report by Respondent’s Environmental, Safety, and Health (ES&H) representative notes that during Frith Senior’s attempted turn, the loaded trailer hit the trailer’s fifth wheel pivot point, causing the trailer to lean on the right side and putting the load at risk. The report further notes that chains should have been used to secure the load rather than the nylon straps that were used. The ES&H report concluded that Frith Senior’s actions were the cause of the unsafe act and that Frith Senior should have refused to hook-up or to move the load until the trailer was properly configured and the load was properly secured.

As discussed above, Frith Senior asserts that despite the fact that he told Nizynski that the trailer was stretched too far, Nizynski told him to move the trailer. Frith Senior also contends that the load did not have to be secured with chains because the I-Beams had rounded corners. There is no dispute that Klingbeil was in the connex at the time that Frith Senior initially called Nizynski to let him know that he had found the trailer loaded rather than empty. Nizynski testified that when Frith Senior initially called him, he only asked about the ownership of the straps on the trailer and stated that the trailer was a stretch trailer that was “kind of stretched out.” Klingbeil recalled that Frith Senior called Nizynski twice before moving the load. Klingbeil asserts that in the first call, Frith Senior told Nizynski that the trailer was a stretch trailer and Nizynski told him, “Yea, I know, it doesn’t matter, whatever.” In the second call, Frith Senior asked Nizynski about the straps and asked if he could keep them to use. Nizynski denied that Frith Senior ever asked him if he should move the load and Nizynski denied telling Frith Senior to move the load.

Respondent asserts that Glynn and Superintendent Jim Honer made the decision to terminate Frith Senior. Glynn testified that the June 26th near miss accident was categorized as “working in an unsafe manner” and considered to be a Category III offense under the company’s work rules. Glynn testified that Frith Senior was terminated because it was his second work rule violation within a year. The work rules provide that if an employee commits a second Category III infraction within 12-month period, the employee will be

terminated for a minimum of 30 days up to the maximum of one year and eligible for rehire only after approval of the Site Manager. Glynn asserted that while he prepared the disciplinary notice for Frith Senior on June 27, 2007, he waited for the final results of the drug test before imposing discipline. He maintained that had the drug test results been positive, the penalty would have prevented Frith Senior’s rehire eligibility.

b. The alleged prior warning

As discussed above, Frith Senior denies that he was ever aware of receiving any prior discipline involving the August 2006 involving Swan. Respondent submitted into evidence a disciplinary warning notice for Frith Senior, showing the infraction date as August 11, 2006. The notice describes the nature of the violation as: “Employee made a derogatory racial remark about his supervisor creating a hostile work environment in violation of the Company’s Equal Employment Opportunity policy.” The document contains a notation dated August 16, 2006 that the “employee refused to sign” and management signatures dated August, 16, 2006. Glynn testified that he prepared the written disciplinary notice that was issued to Frith Senior by Carr and Swan.

13. Conclusions concerning the lawfulness of Frith Senior’s discharge

a. Governing legal principles

The Board has established a specific framework for assessing whether an employee’s termination violates Section 8(a)(3) of the Act. Under the principles of *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved by the United States Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-2 (1983), the General Counsel must establish that union activity was a motivating factor in the action taken against the employee. Once the General Counsel has met this burden, the burden shifts to the employer to establish, by a preponderance of the evidence, that it would have taken the action even in the absence of the employee’s union activity. *Wright Line*, 251 NLRB at 1089. The burden shifts only if the General Counsel establishes that protected conduct was a “substantial or motivating factor in the employer’s decision.” *Budrovich Contracting Co.*, 331 NLRB 1333 (2000). General Counsel must therefore show that the employee’s protected conduct was, in fact, a motivating factor in the employer’s decision. *Webco Industries*, 334 NLRB 608, fn. 3 (2001); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros.*, 303 NLRB 638, 649 (1991).

b. Frith Senior’s discharge was discriminatorily motivated

It is not uncommon for employer knowledge to be a difficult element to establish in cases where the *Wright Line* analysis is used. In this case, however, the employer has a long history of working with the Union and the Respondent asserts that it is a “union-friendly” employer. Despite Respondent’s prior relationship with the Union, it is Frith Senior’s utilization of the Union process that is significant. Thus, it is not Frith Senior’s union membership; but his particular utilization of the union protections and his allegiances to the new Union administration that are noteworthy. The record clearly reflects that Frith Senior’s

particular activities in these areas were well known to Respondent’s supervisors and managers and it is his allegiance to the Union and specific activities on behalf of the Union rather than simply his membership that is significant for Respondent’s knowledge.

5 When Klingbeil first began as a Teamster on the job site, Frith Senior was his general foreman. When Frith Senior was relieved as general foreman, Klingbeil took his place. Klingbeil testified that initially his relationship with Frith Senior did not change after Klingbeil took over Frith Senior’s job as general foreman. Klingbeil explained, however, that eventually the relationship changed because Frith Senior became more demanding. The
10 record reflects, however, that Frith Senior became more demanding as he began to engage in protected activities; he went to the Union hall to assist his son in filing a grievance; he talked to Union Steward Kevin Tatroe about filing a grievance over being denied overtime; and he demonstrated that he was an effective advocate when he represented Scott Olson. As the record reflects, Frith Senior was also threatened for going to the Union hall, talking to Union
15 representatives at the hall, and for attempting to file a grievance.

It is also significant that Klingbeil did not have a good relationship with the new Union administration that came into office at the first of 2007. Klingbeil admitted that he had conflict with the new administration “from day one.” Klingbeil admitted that he and Frith
20 Senior had a “couple” of conversations in which they argued and Klingbeil had accused Frith Senior of “stabbing him in the back” and treating Klingbeil like the enemy. Thus, Klingbeil was admittedly becoming more hostile toward Frith Senior and he felt betrayed by Frith Senior. The record establishes that Frith Senior’s disloyalty, however, was centered in his allegiance to the new Union administration and his exercise of union protections under
25 Klingbeil’s supervision. As discussed above, Klingbeil told Frith Senior: “You better keep your fucking mouth shut to the bastards down at the hall because I’ll be here until the end of the job.” Klingbeil told both Frith Senior and his son that he was in revenge mode and he specifically credited his anger to Frith Senior’s going to the Union hall and “starting shit.” Budnik told Frith Senior that he had been moved from the semi to the water truck because he
30 went to the Union hall and did not keep things “in-house.” Thus, the record clearly reflects Frith Senior’s active involvement in protected activity and the animus that it engendered.

Respondent argues that Counsel for the General Counsel has not made out a *prima facie* case because there is no motivational link or nexus between Frith Senior’s protected
35 activity and the adverse employment action. Respondent asserts “all of General Counsel’s assertions regarding the bias that Respondent allegedly harbored against Senior for engaging in protected activity is grounded on 8(a)(1) statements or conduct by Klingbeil and/or Budnik.” Respondent thus contends that because neither Klingbeil nor Budnik were involved in the two disciplinary incidents and decisions that resulted in Frith Senior’s discharge, there
40 is no motivational nexus. In support of this argument, Respondent cites the Board’s decision in two cases where antiunion animus was demonstrated by a supervisor other than the discharging supervisor. While the requisite discriminatory motive was not found in those cases, the facts of those cases are distinguishable. *C & S Distributors*, 321 NLRB 404, 407 (1996), as cited by Respondent, involved an on-the-spot discharge of an employee for his
45 refusal to obey his supervisor’s direct order on November 9, 1994. Previously on June 1, 1994, the employer’s vice-president drove into the union’s business agent at the picket line. The alleged discriminatee observed the incident and gave a statement to the police who investigated the incident. The administrative law judge, who was affirmed by the Board,

noted that the management official involved in the picket line incident may have harbored union animus. He concluded, however, that there was no evidence that the employer was harassing or otherwise discriminating against the bargaining unit employees because of the strike or the picket incident. Additionally, the discharge in issue occurred five months after the picket line incident and the alleged discriminatee was not involved in any protected activity at or near the time of his discharge.

Respondent also cites the Board's decision in *Browning Manufacturing Co.*, 222 NLRB 102 (1976) where the Board affirmed the administrative law judge in dismissing an unlawful discharge allegation. The judge found that the employer's superintendent lawfully discharged an employee for quitting work early after the employee had been previously suspended and had been warned about leaving work early only a week or two prior to the incident leading to his discharge. The Board affirmed the judge in finding that the record did not establish that any threats were made to the alleged discriminatee by the foreman who was allegedly harboring union animus and ultimately found that the employee was lawfully discharged.

In the instant case, Respondent seeks to isolate Frith Senior's discipline to Glynn and to diminish Klingbeil's participation and involvement. Glynn, in fact, testified that he made the decision to terminate Frith Senior. While the record evidence is replete with the animus directed toward Frith Senior by both Klingbeil and Budnik, there is no allegation that Glynn threatened Frith Senior or even made any statements evidencing animus. Nevertheless, discriminatory motive may be inferred. First, the timing of Frith Senior's discharge is indicative of a discriminatory motive. Frith Senior was terminated less than two weeks after he successfully advocated on behalf of Scott Olson. Glynn was forced to reverse his decision to terminate Olson because of Frith Senior's vehement representation.

General Counsel does not allege Frith Senior's discharge as a violation of Section 8(a)(4) of the Act. I find it noteworthy, however, that at the time of Frith Senior's near miss accident on June 26 he had already filed unfair labor charges against Respondent. On May 5, 2007, Frith Senior filed a charge with the Board, alleging that Respondent had harassed him, imposed more onerous work assignments, and engaged in surveillance of him because of his union and protected activities. On June 17, Frith Senior filed an amended charge expanding his allegations to include eleven specific incidents in which Respondent violated Sections 8(a)(1) and (3) of the Act. Thus, in addition to his new duties as a union steward, Frith Senior was also utilizing the Board's process in asserting his statutory rights and protections.

More importantly, however, the total record evidence supports a finding that the asserted reason for Frith Senior's discharge was pretextual. There is no dispute that Frith Senior's near-miss accident on June 26, 2007 caused a potential safety hazard and I have no doubt that discipline was appropriate under the circumstances. The fact, however, that Respondent reached back to an earlier alleged discipline to bring Frith Senior into the second step of progressive discipline reflects the pretextual nature of his discharge. As discussed more fully herein, there is no credible evidence that the alleged August 2006 discipline was ever imposed on Frith Senior. Respondent's attempt to impose this alleged August 2006 as a basis for a June 2007 discharge strongly supports a finding of discriminatory motive. As the Court stated in its 1966 decision in *Shattuck Denn Mining Corp. v. NLRB*, 366 F.2d 466, 470 (6th Cir. 1966):

Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book. Nor is the trier of fact - here the trial examiner- required to be any more naïf than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal- an unlawful motive- at least where, as in this case, the surrounding facts tend to reinforce that inference.

Thus, proof of discriminatory motive can be based on direct evidence or can be inferred from the circumstantial evidence based on the record as a whole. *Leading Edge Aviation Services, Inc.*, 345 NLRB No. 75, slip op. at 2 (2005); *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987). Accordingly, for the reasons stated above, and as discussed more fully herein, I find that General Counsel has made a *prima facie* case showing unlawful motivation on the part of Respondent for its discharge of Frith Senior.

c. Respondent has not met its *Wright Line* burden

(1) Prevailing legal authority

Under *Wright Line*, “an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected activity.” *Hicks Oils & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989), *enfd.* 942 F.2d 1140 (7th Cir. 1991). If the evidence shows that the proffered lawful reason for the discharge did not exist, or was not in fact relied upon, the Respondent’s reason is pretextual. *La Gloria Oil and Gas Co.*, 337 NLRB 1120, 1123 (2002). As I have discussed more fully below, I find Respondent’s proffered reason for Frith Senior’s discharge to be pretextual. As the Board has determined: “A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motivation motive established by the General Counsel.” *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1989). I find that Respondent relied upon a pretextual reason for Frith Senior’s discharge and has failed to demonstrate that it would have discharged Frith Senior even if he had not engaged in protected activity.

(2) The basis for finding a pretextual discharge

General Counsel relies upon a number of factors in asserting that Respondent’s reasons for terminating Frith Senior are pretextual. General Counsel asserts that Respondent did not apply progressive discipline in a manner that comports with its work rules. General Counsel maintains that because Respondent’s rules are divided into four categories, the rules provide for progressive discipline for infractions within each category and are not meant to be applied across different categories. Respondent asserts that Frith Senior was terminated

because he violated a work rule in category II and in category III. There is, however, no evidence to indicate that by applying progressive discipline across different categories, Respondent treated Frith Senior any differently than any other employees who have been disciplined under the rules. There was no evidence to rebut Glynn's testimony that progressive discipline could be imposed because of infractions in different categories.

General Counsel also asserts that Frith Senior's discipline in 2007 was improper because Frith Senior simply followed the instructions of Nizynski. I do not find merit to this argument. Frith Senior's testimony clearly indicates that he knowingly moved the trailer even though he knew that the trailer was stretched out to 80 feet and was not appropriate for the length of the beams. Even though Frith Senior contends that he reported to Nizynski that the trailer was stretched out too far and that Nizynski nevertheless told him to move it, Nizynski's instruction did not absolve Frith Senior from a responsibility to use precaution and follow safety standards. Frith Senior never testified that he was unaware of what might happen if he moved the trailer under those conditions. He simply asserts that he did so because he was instructed to do so by the dispatcher. General Counsel submits that Nizynski's primary role is to function as a conduit for the transmission of job assignments and other communications from supervision and that as such, Nizynski is an agent of Respondent and his statements are attributable to Respondent. The Board has certainly found that where an employer places a rank-and-file employee in a position where employees could reasonably believe that the employee spoke on behalf of management, the employer has vested the employee with apparent authority to act as the employer's agent, and the employee's actions are attributable to the employer. *Dentech Corp.*, 294 NLRB 924, 926 (1989); *Futuramik Industries*, 279 NLRB 185 (1986). In the instant case, however, the record evidence does not support a finding that Nizynski was acting as Respondent's agent in telling Frith Senior to move the load. By his own testimony, Frith Senior initially only reported to Nizynski that the trailer was not empty and that it was loaded with new straps that he wanted to keep. While Frith Senior subsequently told Nizynski that the trailer was stretched out to 80 feet, he provided scant information about how the beams were loaded other than to confirm that they were loaded with what appeared to be new straps. There is no dispute that Klingbeil overheard Frith Senior's conversation with Nizynski and he could certainly have intervened had he thought it necessary. While Frith Senior asserted in his testimony that he told Nizynski that the trailer was stretched too far, neither Klingbeil nor Nizynski were given sufficient information to determine the safety or appropriateness of moving the trailer. Frith Senior's failure to provide adequate information and his failure to use precaution in moving the load cannot be attributed to Nizynski as an agent.

General Counsel also submits that Frith Senior was set up because Klingbeil should have immediately intervened and instructed Frith Senior not to pull the trailer. General Counsel asserts that Klingbeil's permitting Nizynski to instruct Frith Senior to pull the trailer suggests that Klingbeil was trying to set up Frith Senior for a safety violation. While the record supports that Klingbeil harbored animus toward Frith Senior, it is not reasonable that he would intentionally risk an accident or endanger anyone's safety only to set up Frith Senior for a disciplinary action.

Thus, the entire record evidence reflects that Frith Senior engaged in the conduct on June 26, 2007 for which he was disciplined. There is nothing to show that Respondent disparately disciplined him for the near-miss incident. If this case only involved an issue of

whether Frith Senior was lawfully disciplined for his conduct on June 26, 2007, the evidence would arguably demonstrate that Respondent met its burden under *Wrightline* and that Frith Senior would have been disciplined even if he had not engaged in protected activity.

5 The Respondent, however, did not choose to simply discipline Frith Senior for the June 26, 2007 incident. Respondent seized the opportunity to terminate Frith Senior by adding an additional discipline that is shown to be invalid. As discussed below, Respondent has failed to show that the alleged prior discipline of August 2006 was actually imposed upon Frith Senior. By incorporating and relying upon this alleged prior discipline, Respondent's
10 asserted reason for discharge is clearly pretextual.

d. The alleged August 2006 discipline

(1) The testimony of Swan and Taloff

15 Frith Senior not only vehemently denies that he ever received a disciplinary warning in August 2006; he denies any knowledge of its existence. He testified that during a conversation in the parking lot, Carr told him that he had been accused of using a racial slur in relation to Swan. Frith Senior asserts that he denied the comment to Carr and then to Swan.
20 Frith Senior maintains that he understood the matter to be resolved and nothing further came of it.

To contradict the testimony of Frith Senior, Respondent presented the testimony of John Swan and John Taloff to testify about the August 2006 incident. Swan testified that he first found out about Frith Senior's statement when Don Dlobik called him and told him that he had something "serious" to tell him. Swan recalled that he then met Dlobik at the on-site warehouse. Swan described Dlobik as upset and recalled that his hands were shaking. Swan asserts that after Dlobik repeated the racial slur to him, he told Dlobik to prepare a written statement of the account. In contrast to Swan's testimony, Dlobik testified that his first action
25 after hearing Frith Senior's racial slur was to make a complaint to Glynn. He recalled that he prepared the written statement at the direction of Glynn. When asked if he had said anything to Swan about the racial slur, he testified only that Swan had been in the office when he brought the complaint to Glynn.
30

35 Swan testified that he previously saw Frith Senior's August 2006 warning when he met with Frith Senior, Superintendent Carr, and Union Steward John Taloff in the connex. Swan testified that during the meeting he asked Frith Senior if he had made the comment about him and Frith Senior denied doing so. Swan also recalled that Carr asked Frith Senior if he made the statement and Frith Senior denied doing so. Swan asserts that after the meeting
40 in the connex, all four of the individuals walked over to the Labor Relations Department. He asserts that in a second meeting with the same individuals, Carr again asked Frith Senior if he made the statement and Frith Senior denied that he had done so. Swan testified that Frith Senior was told that he was being disciplined and he refused to sign the notice of discipline. Swan contends that because Frith Senior refused to sign the discipline, the discipline was
45 "kept on file" and Carr documented that Frith Senior refused to sign the statement. Swan specifically testified that Frith Senior was handed the disciplinary warning notice and that he refused to sign the document. Swan also testified that even though Frith Senior refused to sign the document, a copy of the discipline was given to Union Steward Taloff. In contrast,

Taloff denied that he received a copy of the discipline and he acknowledged that he did not know if Frith Senior received a copy of the discipline.

During Swan's testimony, he was asked if he spoke with Union Business Agent Gurich during Frith Senior's July 2007 discharge interview. Swan testified that Gurich had simply asked him if he remembered giving Frith Senior the discipline and Swan confirmed that he had. Swan specifically denied that he told Gurich that the discipline had never been imposed or that it had been rescinded. Swan, did not, however, deny admitting to Gurich that the only meeting involving the discipline may have occurred in the parking lot.

Taloff testified that he first saw Dlobik's August 11, 2006 handwritten statement concerning Frith Senior during a meeting with Klingbeil in Glynn's office. He initially testified that Glynn, Carr, and Swan joined the meeting. Taloff testified that following this initial meeting with the managers, Frith Senior was then called into the office to corroborate or respond to the statement. During direct examination, Taloff recalled that the initial meeting with management and then the second meeting with Frith Senior occurred on August 16, 2006. During cross examination, however, Taloff testified that he first met with Klingbeil about the statement on Friday, August 11, 2006 and the meeting in which Frith Senior was shown the discipline occurred on a different day.

Taloff initially recalled that the meeting attended by Frith Senior occurred in Glynn's office and it was attended only by Frith Senior, Carr, Swan, and himself. During cross-examination, Taloff testified that Glynn was also present when the managers spoke with Frith Senior about the statement. Taloff initially testified that he made notes during the course of the meeting. Taloff testified that during the meeting with Frith Senior, Carr read the disciplinary warning notice to Frith Senior and then slid the document over to Frith Senior. He recalled that Frith Senior stated that he would not sign the disciplinary notice without the presence of his union business agent. Taloff recalled that the document was passed back to Carr and Carr wrote something on the document.

On redirect examination, Taloff testified that there had actually been three meetings in which he participated. He asserted that during the first meeting, he had been shown Dlobik's statement. During the second meeting, both Glynn and Frith Senior had been present along with some of the managers and Frith Senior had been asked about the incident. Taloff asserted that during the third meeting, Frith Senior met with Carr, Swan, and himself and Frith Senior was shown the copy of the disciplinary warning. In later testimony, he confirmed that he took no notes during the first meeting and he could not recall if he had taken any notes during the second meeting. Taloff identified his only notes as those alleged to have been written on August 16, 2006. The notes introduced into evidence contain "8-16-06" at the upper right corner of the page and include the following:

At 8:00 I was called down from coal handling to the 14 wide. When I arrived, Vince Klingbeil and John Swan called me over where they were standing outside the 14 wide. I was told by Vince that Tom Frith Senior was to receive a written warning. I noticed Tom F And Bob Carr in a private conversation about 50' from where I was.

Thus, Taloff's only written account of anything related to the alleged August 2006 discipline

was a note documenting that Frith Senior and Carr spoke outside the 14-wide trailer, which was consistent with Frith Senior’s testimony. Contrary to his testimony, his written notes do not document that the discipline was actually presented or shown to Frith Senior.

5 The record evidence therefore indicates a number of inconsistencies in both the testimony of Swan and Taloff. While Swan testified that Frith Senior was first given the disciplinary warning notice at a meeting in the connex, Taloff ultimately testified that the only meeting in which the disciplinary warning was given to Frith Senior occurred in Glynn’s office in the 14-wide trailer. While Respondent did not call Carr as a witness, Carr’s undated
10 typed statement was introduced into evidence. In Carr’s statement, he documents that he had, in fact, been the individual to ask Dlobik to prepare a written statement about the alleged racial slur. While Carr documents that he informed Frith Senior about the disciplinary warning in a meeting with Frith Senior and the Union steward in the 14-wide trailer, he makes no mention of any separate investigatory meeting or any other meeting with Frith Senior in
15 the connex.

(2) The absence of testimony by Carr and Klingbeil

20 Although it was Carr who documented that Frith Senior refused to sign the August 2006 disciplinary warning, Carr did not testify. There is no dispute however, that he remains employed by Respondent as a superintendent at an Ohio project. Swan testified that Klingbeil was present for the meeting with Frith Senior at the connex. Designated as someone who was essential to the presentation of Respondent’s case, Klingbeil remained in the courtroom during the entire hearing and he testified twice on behalf of Respondent. As discussed above,
25 there were numerous inconsistencies in the testimony of Taloff and Swan concerning the number and the locations of the meetings relating to Frith Senior’s alleged August 2006 discipline. Despite these inconsistencies, Klingbeil never testified concerning his knowledge of the August 2006 warning.

30 During examination by Counsel for the General Counsel, Klingbeil identified two statements that contained his handwriting. Klingbeil’s notes dated August 11, 2006, reflect that he was called into Glynn’s office and shown Dlobik’s statement. Klingbeil also documents that the steward was called in and it was determined that Frith Senior would receive a warning rather than his being discharged. Klingbeil’s statement then documents the
35 following for Monday, August 14, 2006:

I was in the 14 wide on other business and asked about Tom [sic] situation and was told they John Swan + Bob Carr were going to let it ride and see what happens.”

40 Other notes written by Klingbeil indicate that he was involved in other meetings concerning this incident. In other notes, Klingbeil claimed that he was present at the connex when Carr and Swan asked Frith Senior to sign the discipline. As Counsel for the General Counsel points out, the issue as to whether the August 2006 discipline was actually given to Frith
45 Senior was one of the most highly contested issues in the litigation and yet Respondent did not have Klingbeil testify concerning this matter. Had Klingbeil testified concerning this matter, he would have no doubt been asked why his notes reflect that Swan and Carr determined on August 14, 2006 that they were going to ‘let it ride,’ arguably indicating that

they did not intend to pursue the matter.

Klingbeil's notes dated August 16, 2006 purport to corroborate that Frith Senior was notified of the discipline and refused to sign the notice of discipline. His notes of August 16, 2006, however, are inconsistent. The first section of the handwritten note dated August 16, 2006 discusses a conversation at 7:30 a.m. with Carr and Swan. The note documents that Carr and Swan told him that Frith Senior was going to receive discipline and Klingbeil's note also documents that Frith Senior and Carr had a private conversation. Klingbeil's notes of August 16, 2006 further reflect that when he was called to the 14-wide at 9:00 a.m., Swan told him that the "statement" was going to be filed as Frith Senior had refused to sign it. The notes then reveal that at 1:30 p.m. Frith Senior was called to the connex by Swan and Carr and asked to sign the statement and Frith Senior refused to do so.

Had Klingbeil testified concerning the incident, it is likely that he would also have been asked about the inconsistency in his notes for August 16, 2006. Certainly he would have been asked why Swan told him at 9:00 a.m. that the disciplinary warning was going to be filed as Frith Senior had refused to sign it and then why Swan and Carr would have called Frith Senior to the connex four and a half hours later for Frith Senior to be shown the statement. As pointed out above, Carr was not presented to testify concerning this discipline and the testimony of Swan and Taloff was inconsistent and contradictory in many respects. Klingbeil's testimony concerning these meetings and clarification of his notes may have further supported Respondent's assertion that Frith Senior was given the 2006 discipline. I find it significant that he was not presented to substantiate this assertion. I also draw an inference that had Klingbeil testified concerning the details of Frith Senior's alleged 2006 discipline, his testimony would not have been favorable to Respondent's assertions. Certainly, it has been found that the failure of an employer to produce relevant evidence that is particularly under its control allows the trier of fact to draw an adverse inference that such evidence would not be favorable to it. *International Automated Machines*, 285 NLRB 1122, 1123 (1987). *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, fn. 1 (1977).

(3) Information given to the State of Wisconsin

The form submitted by Respondent to the State of Wisconsin regarding Frith Senior's claim for unemployment compensation indicates that Frith Senior received his first warning on June 27, 2007. The form indicates that it was completed by Jeff Parzych, an accountant who works at the Elm Road Generating Station jobsite. Glynn testified that Respondent utilizes a company identified as UC Express to handle Respondent's unemployment claims processing and that Parzych provides UC Express with information about terminations. Respondent argues that the accountant was unaffiliated with Respondent's Labor Relations office and had no involvement in or knowledge of the disciplinary proceedings. Respondent asserts that he simply misread the disciplinary notice which he was forwarding to the third party administering Respondent's unemployment matters.

Assuming that Parzych had no personal knowledge of Respondent's disciplinary proceedings, it is reasonable that he completed the form with the benefit of Frith Senior's personnel file and employment records. As Counsel for the General Counsel points out, it is interesting that someone who was not involved in the termination and had no stake in the matter was not able to construe from the records that Frith Senior was given his first

discipline in August 2006. Additionally, General Counsel submits that if Parzych’s mistake was simply a clerical mistake, any confusion could have been eliminated by his testimony. He was not, however, called to testify.

(4) Frith Senior’s failure to grieve the alleged prior discipline

As cited above, there are a number of factors that demonstrate the pretextual reliance upon this alleged August 2006 discipline. The most significant factor, however, is Frith Senior’s failure to file a grievance concerning this 2006 discipline. When Frith Senior was informed that he was terminated for the second violation of the work rules, Frith Senior adamantly denied receiving a prior warning or discipline. He recalled that he told Glynn:

“Greg, you know how pro union I am. You know if I’d have got a reprimand I’d have filed a grievance in half a heartbeat.”

Frith Senior went on to assure Glynn that if he had ever received anything like the prior discipline he would have immediately filed a grievance and he denied ever seeing the prior warning. The entire record evidence supports crediting Frith Senior’s testimony in this regard. Respondent submitted a good deal of testimony about Frith Senior’s attitude and conduct. Respondent presented Nizynski to testify about a specific conversation with Frith Senior in May 2007. Nizynski testified that he overheard Frith Senior complaining that some of the employees from the other trades had tried to cause him to miss the employee bus. Nizynski recalled that in response to what he overheard, he turned to a second shift foreman and told him that Frith Senior was not telling the truth. Apparently having heard Nizynski’s comment about him, Frith Senior came into the change-out area pointing his finger at Nizynski. Frith Senior is alleged to have said “Stan, if I ever catch you in Menominee Falls, I’ll kick your mother fucking ass.” When Nizynski asked if Frith Senior’s statement was a threat, Frith Senior assured him that it was “a promise.”

Although Nizynski’s testimony concerning this May 2007 conversation was certainly collateral evidence, Frith Senior did not deny that it occurred. Based upon the record as a whole, I credit Nizynski’s testimony concerning this conversation. While the conversation is not otherwise relevant, it demonstrates Frith Senior’s penchant for asserting himself when he deems it necessary. During the course of the hearing, Respondent elicited testimony from a number of witnesses alleging not only Frith Senior’s lack of decorum in dealing with other employees but also his boldness in asserting his personal rights. Although I have not included a reference in this decision to every incident in which Frith Senior is alleged to have demonstrated such demeanor, the overall record suggests that such conduct and demeanor may have been characteristic of Frith Senior. In finding this to be the case, I must also conclude that Frith Senior would not only have filed a grievance, but it is likely that he would have pursued every means available to him to contest the alleged August 2006 disciplinary action. The fact that Frith Senior filed a charge with the Board on June 26, 2007, the very day that he was suspended over the near-miss accident, demonstrates Frith Senior’s assertiveness in standing up for his perceived rights. If any one thing is clear from this record, it is the fact that Frith Senior was not reticent about asserting his rights and expressing his personal opinions. Thus, the only reason that Frith Senior did not grieve the August 16, 2006 disciplinary action is the fact that it was never issued to him.

(5) Conclusion

As discussed above, I credit Frith Senior's testimony that he was unaware of any discipline issued to him in August 2006. I not only base this upon my conclusion that he would have grieved the discipline, but also because of the contradictory and conflicting testimony of Respondent's witnesses and the absence of the testimony of those witnesses who would have been able to provide necessary clarification and substantiation.

Accordingly, because Respondent has based Frith Senior's termination in part on the alleged August 2006 discipline, I find Respondent's reasons for termination to be pretextual. It is well settled that disbelief of pretextual reasons such as these strongly indicates that the pretextual reasons are offered to hide unlawful conduct, and that the opposite of the reasons may be inferred. *A to Z Portion Meats, Inc.*, 238 NLRB 643, 643 (1978). Therefore, I find that Frith Senior's discharge⁹ on July 2, 2007 violated Section 8(a)(3) and (1) of the Act.

14. The issue of deferral

On July 25, 2007, Respondent requested that Region 30 defer the consolidated cases to the appropriate grievance/arbitration provision of the PLA, asserting that the PLA contains a grievance/arbitration provision and that Frith Senior filed a grievance protesting his termination. On July 26, 2007, the Regional Director for Region 30 denied Respondent's request to defer to the grievance/arbitration procedure. Specifically, the Regional Director observed the absence of anything in the PLA that would allow the resolution of the 8(a)(1) allegations in the consolidated complaint. Additionally, the Regional Director found that deferral was not appropriate because the 8(a)(1) allegations did not appear to be based on an interpretation of the collective bargaining agreement. Hence, deferral of only the 8(a)(3) allegations would not be appropriate. Furthermore, the Regional Director pointed out that the nature of the alleged 8(a)(1) threats was directly related to employees who have used the grievance/arbitration process.

Respondent argues that the record evidence reveals that Frith Senior's allegations "entail garden variety discipline and discharge cases that center and will turn on the 'discipline for cause' provision of the PLA." Respondent also argues that inasmuch as there are no questions of statutory construction at stake, deferral is appropriate.

Citing the Board's decision in *Wonder Bread*, 343 NLRB 55 (2004), in which the Board cited its earlier decision in *United Technologies Corp.*, 268 NLRB 557, 558 (1984), Counsel for the General Counsel lists the factors that must be present for appropriate deferral.

⁹ General Counsel asserts that because Frith Senior's Union and protected activity was the motivating factor in Respondent's decision to terminate him, his suspensions of June 26 and June 29, 2007 were also unlawfully motivated and violative of Section 8(a)(3) of the Act. I do not find, however, that the record supports such a finding with respect to his suspensions. There is no dispute that Frith Senior was involved in a near-miss accident on June 26, 2007. Because of his involvement in the accident, he was required to submit to the mandatory drug screening. There is no record evidence to indicate that the drug tests administered to Frith Senior were tainted or otherwise affected by Respondent's misconduct. Thus, his suspensions pending the outcome of the two drug tests were not shown to be inappropriate or unlawful. Therefore, I do not find the suspensions of June 26 or June 29 to be violative of Section 8(a)(3) and (1) of the Act.

Specifically, deferral is appropriate when these factors are present: the dispute arose within the confines of a long and productive collective bargaining relationship; there is no claim of employer animosity to the employees’ exercise of protected statutory rights; the parties’ agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution.

As Counsel for the General points out, this case clearly involves a claim of employer animosity to the employees’ exercise of protected statutory rights. The record is replete with allegations that Klingbeil and Budnik threatened Frith Senior with unspecified reprisals for his going to the union hall and to discourage him from filing grievances. As discussed above, I find that through the statements of Klingbeil and Budnik, Respondent engaged in a series of threats against Frith Senior as well as reprisals for his protected activity. The Board has found such conduct fundamentally at odds with the Act and the Board’s deferral policy.¹⁰ I also find it significant that an arbitrator does not have the authority under the PLA to fashion a remedy that will cure Respondent’s unlawful 8(a)(1) conduct. As Counsel for the General Counsel asserts, there is no language in the PLA that gives an arbitrator the power to order “cease and desist” relief. See *Clarkson Industries, Inc.*, 312 NLRB 349, 351 (1993). Accordingly, inasmuch as all of the requisite factors have not been met, I do not find it appropriate to defer the allegations of the consolidated complaint to the grievance/arbitration process. Even if the arbitrator could fashion an appropriate remedy for the 8(a)(3) allegations, the Board has not found it prudent to require litigation of related issues in more than one forum and has declined to bifurcate closely related issues in such circumstances. *Id* at 352.

Conclusions of Law

1. Bechtel Construction Company, Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters “General” Local No. 200, affiliated with the International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening an employee with unspecified reprisals because the employee engaged in union activities, the Respondent violated Section 8(a)(1) of the Act.

4. By threatening an employee with termination because the employee engaged in union activities, the Respondent violated Section 8(a)(1) of the Act.

5. By threatening an employee with more onerous working conditions because the employee engaged in union activities, the Respondent violated Section 8(a)(1) of the Act.

6. By refusing to allow Thomas Frith, Sr. to work overtime, Respondent violated Section 8(a)(3) and (1) of the Act.

¹⁰ *United States Postal Service*, 290 NLRB 120, 120-121 (1988).

7. By assigning more onerous work duties and undesirable equipment to Thomas Frith, Sr., the Respondent violated Section 8(a)(3) and (1) of the Act.

8. By discharging Thomas Frith, Sr., the Respondent violated Section 8(a)(3) and (1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Thomas Frith, Sr., it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). General Counsel argues that based upon circuit court precedent in employment discrimination cases and in keeping with the policy adopted by the Office of Personnel Management and the U.S. Department of Labor, compound interest should be ordered as a part of the backpay award. General Counsel also asserts that the Board should compound the interest owed on a quarterly basis, citing the practice of the Internal Revenue Service in assessing daily compounded interest with regard to the overpayment or underpayment of federal income taxes. General Counsel presented a very thorough and extensive discussion of this issue. While I am mindful that the Board at one time referenced¹¹ its consideration of modifying its interest calculation procedures, there is no existing Board authority to deviate from the past practice of ordering the award of simple interest. *Rogers Corp.*, 344 NLRB No. 60, slip op. at 1 (2005). Accordingly, I do not recommend the award of compounded interest as requested by General Counsel.

In order to remedy its discriminatory denial of overtime to Frith Senior, I find that Respondent must be ordered to make him whole for any loss of earnings suffered as a result of its failure to assign him overtime on or about March 19, 2007 and April 5, 2007.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:¹²

¹¹ *Alaska Pulp Corporation*, 300 NLRB 232, fn. 4 (1990).

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Bechtel Construction Company, Oak Creek, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with unspecified reprisals because they engage in union activity.

(b) Threatening employees with termination because they engage in union activity.

(c) Threatening employees with more onerous working conditions because they engage in union activity.

(d) Refusing to allow employees to work over time because they engaged in union and protected activities.

(e) Assigning more onerous work duties and undesirable equipment to employees because they engaged in union and protected activities.

(f) Terminating its employees because they engaged in union and protected activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Thomas Frith, Sr. full reinstatement to his former job, or if that job no longer exists to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. Make whole Thomas Frith, Sr., for any loss of earnings suffered as a result of the discriminatory denial of overtime and for his discharge on July 2, 2007 in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to Robert Frith, Sr.'s unlawful discharge and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the

terms of this Order.

(d) Within 14 days after service by the Region, post at its Oak Creek, Wisconsin facility copies of the attached notice marked “Appendix.”¹³ Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2007.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., March 10, 2008.

Margaret G. Brakebusch
Administrative Law Judge

¹³ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten our employees with unspecified reprisals because they engage in union activities.

WE WILL NOT threaten our employees with termination because they engage in union activities.

WE WILL NOT threaten our employees with more onerous working conditions because they engage in union activities.

WE WILL NOT refuse to allow our employees to work overtime because they engage in union or other protected activities.

WE WILL NOT assign our employees more onerous work duties and/or undesirable equipment because they engage in union or other protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Teamsters “General” Local No. 200, affiliated with the International Brotherhood of Teamsters or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board’s Order, make Robert Frith, Sr., whole for any lost wages because we denied him overtime.

WE WILL, within 14 days of the Board’s Order, offer Robert Frith, Sr. immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Frith, Sr. whole for any loss of earnings or other benefits suffered as a result of his unlawful discharge.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Robert Frith, Sr., and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

BECHTEL CONSTRUCTION COMPANY

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal Agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to an agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

310 West Wisconsin Avenue – Suite 700, Milwaukee, WI 53203-2211
(414) 297-3861, Hours: 8:00 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER. (414) 297-3819.